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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 MONTEZ DAY,

11 Petitioner,

12 v.

13 UNITED STATES OF AMERICA,

14 Respondent.

Case No. CV _____
CR 99-00123-AHM

**MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY
(FILED PROTECTIVELY) AND
NOTICE OF FILING OF SECOND
OR SUCCESSIVE PETITION IN
THE NINTH CIRCUIT**

**FILED PURSUANT TO JOHNSON V.
UNITED STATES**

17 Petitioner, by and through his counsel of record Brianna Fuller Mircheff, hereby
18 files the attached motion to vacate his sentence. This petition is filed protectively, in
19 order to ensure compliance with the one-year statute of limitations. Petitioner further
20 notifies the Court that he has filed an application for leave to file the instant second or
21 successive motion to vacate his sentence in the Ninth Circuit, Case No. 16-71519.
22 Petitioner asks that this Court hold this petition in abeyance until such time as the Ninth
23 Circuit grants his application. Petitioner will notify the Court if his application is
24 granted.

25 Respectfully submitted,

26 HILARY POTASHNER
27 Federal Public Defender

28 DATED: May 18, 2016

By /s/ Brianna Fuller Mircheff

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Deputy Federal Public Defender

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 MONTEZ DAY,
12
13 Petitioner,
14 v.
15 UNITED STATES OF AMERICA,
Respondent.

Case No. CV _____
[CR 99-00123-AHM]

**MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE UNDER
28 U.S.C. § 2255**

16
17 Petitioner Montez Day, through undersigned counsel, hereby respectfully moves
18 this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

19 Respectfully submitted,

20 HILARY POTASHNER
21 Federal Public Defender

22 DATED: May 18, 2016

23 By /s/ Brianna Fuller Mircheff
BRIANNA FULLER MIRCHEFF
24 Deputy Federal Public Defender
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26
27
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- Exhibit B: Change of Plea Hearing Transcript (May 14, 1999, CR 59)
- Exhibit C: Sentencing Hearing Transcript (October 25, 1999, CR 59)
- Exhibit D: Judgment and Commitment Order (October 25, 1999, CR 53)
- Exhibit E: Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody (November 7, 2000, CR 61)
- Exhibit F: Order Denying Section 2255 Petition (November 29, 2001, CR 75; District Court Case No. CV 00-11896, Dkt. 3)
- Exhibit G: Motion for Leave of Court Pursuant to Rule 15 (November 29, 2001, CR 79; District Court Case No. CV 00-11896, Dkt. 5)
- Exhibit H: Motion for Reconsideration Pursuant to Federal Rules of Civil Procedure, Rule 60(b) (December 11, 2001, CR 83; District Court Case No. CV 00-11896, Dkt. 6)

**MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255**

I. INTRODUCTION

Petitioner Montez Day, by and through his attorney, Deputy Federal Public Defender Brianna Fuller Mircheff, hereby submits this motion to vacate, set aside, or correct his sentence, based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), is void for vagueness. *Johnson*'s reasoning applies equally to the residual clauses in the career offender guideline, U.S.S.G. § 4B1.2(a)(2), and in 18 U.S.C. § 924(c)(3)(B). Therefore, in light of *Johnson*, Mr. Day's sentence under U.S.S.G. § 4B1.1 and seven-year mandatory consecutive sentence under 18 U.S.C. § 924(c) were imposed in violation of the Constitution or the laws of the United States and exceeded the maximum authorized by law.

II. PROCEDURAL HISTORY

A. Conviction and Sentencing

Mr. Day was charged in a three-count Indictment. (Ex. A, Indictment, CR 13.) On May 14, 1999, he pleaded guilty without a plea agreement to all of the charges in the Indictment against him: one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count 1); one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Count 2); and one count of use of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3). (Ex. B, Change of Plea Hearing Transcript, CR 59.) On October 25, 1999, he was sentenced to 288 months imprisonment under the then-mandatory Sentencing Guidelines—60 months on Count 1, 204 months on Count 2, to be served concurrently, and a mandatory consecutive 84

1 months on Count 3 (the Section 924(c) count). (Ex. C, Sentencing Transcript, CR 59,
2 at 37; Ex. D, Judgment and Commitment Order, CR 53.)¹

3 Two things drove Mr. Day's sentence. First, the Section 924(c) charge: Count 3
4 of the Indictment charged Mr. Day with violating Section 924(c) when he "knowingly
5 used and carried a firearm, namely, a loaded .38 caliber revolver, during and in relation
6 to a crime of violence, namely, robbery of Home Savings of America . . . in violation of
7 Title 8, United States Code, Section 2113(a), by brandishing the pistol at the employees
8 and customers[.]" (Ex. A, Indictment, at 6.)² Mr. Day admitted that he was guilty of
9 this offense under a *Pinkerton* theory of liability. (Ex. B, Change of Plea Transcript, at
10 22.) By operation of law, this 924(c) conviction carried a mandatory consecutive
11 sentence of 84 months. (Ex. B, Change of Plea Hearing Transcript, at 26; *see also* 18
12 U.S.C. § 924(c)(1).)

13 Second, Mr. Day was found to be a career offender. The Presentence Report
14 ("PSR") concluded that Mr. Day was a career offender under U.S.S.G. § 4B1.1 because
15 the instant offense, armed bank robbery in violation of 18 U.S.C. § 2113(a), (d) "meets
16 the definition of a 'crime of violence' as set forth in Section 4B1.2(a)", and Mr. Day
17 also had the requisite two prior qualifying felony convictions. (PSR ¶¶ 47-50.) The
18 first career offender predicate was Mr. Day's 1992 conviction for possession with
19 intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1). (PSR ¶¶ 48; 64-70;
20 U.S. District Court, Western District of Tennessee, Dkt. No. 90-20034.) The second of
21 the career offender predicates was Mr. Day's 1995 conviction for bank robbery, in
22 violation of 18 U.S.C. § 2113(a). (PSR ¶¶ 49; 71-75.)

24
25 ¹ Unless otherwise indicated, all citations to "CR" refer to the clerk's record in
CR 99-00123, Mr. Day's underlying criminal case in this Court.

26 ² While Count 3 of the Indictment describes the predicate offense as "bank
27 robbery in violation of Title 18, United States Code, Section 2113(a)," Count 2, the
28 predicate, is actually for *armed* bank robbery in violation of 18 U.S.C. § 2113(a), (d).
This Petition addresses both unarmed and armed bank robbery as a 924(c) predicate,
out of an abundance of caution.

1 The career offender finding and Mr. Day's Section 924(c) conviction both had a
2 significant impact on Mr. Day's sentence. The PSR found that his non-career-offender
3 offense level was 27, but that his career-offender offense level was 31, a swing of four
4 levels. (PSR ¶ 44; 54.) Moreover, because all career offenders are automatically
5 placed in Criminal History Category VI, *see* U.S.S.G. § 4B1.1(b), the career offender
6 determination increased Mr. Day's criminal history category from V to VI. (PSR ¶¶
7 79-80.) In total, then, the career offender determination caused Mr. Day's guideline
8 range to jump from 120-140 months to 188-235 months. (PSR ¶ 115.) In addition, the
9 Section 924(c) conviction on Count 3 added a mandatory consecutive 84 months on top
10 of that, for a total guidelines range of 272-319 months. (Ex. C, Sentencing Transcript,
11 at 37.)

12 Mr. Day argued that his criminal history was overstated based on the minor
13 nature of his predicate prior conviction for possession of cocaine and the fact that the
14 offense occurred when he was young. (Ex. C, Sentencing Transcript, at 11:6-16; 18-
15 19.) Additionally, Mr. Day sought a downward departure based upon extraordinary
16 childhood abuse. (Ex. C, Sentencing Transcript, at 11:17-23; 13-18.)

17 The court declined to depart from the guideline range, agreeing with the
18 government that the circumstances of the prior controlled substance offense and the
19 nature of the drug that was possessed made it an appropriate predicate for the career
20 offender designation. (Ex. C, Sentencing Transcript, at 11:24-25; 12:1-4; 32.) The
21 court also found that although it had the discretion to make a downward departure
22 based on extraordinary childhood abuse, it did not think a departure was warranted in
23 this case. (Ex. C, Sentencing Transcript, at 12-13.)

24 At the sentencing hearing held on October 25, 1999, the district court imposed a
25 term of 288 months imprisonment, consisting of 60 months on Count 1 and 204 months
26 on Count 2, to be served concurrently, and a mandatory consecutive 84 months on
27 Count 3 (the Section 924(c) count). (Ex. C, Sentencing Transcript, at 37.)

28 Mr. Day did not file a direct appeal of his case.

B. Section 2255 Motion

On November 7, 2000, Mr. Day filed a motion pursuant to 28 U.S.C. § 2255, claiming: (1) his attorney was ineffective in that he misadvised Mr. Day regarding the statutory maximum sentence under 18 U.S.C. § 924(c) and pressured Mr. Day into pleading guilty; (2) the career offender determination overstated the seriousness of his prior criminal history; and (3) he should have received a downward departure for extraordinary childhood abuse. (Ex. E, Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody, CR 61; Ex. F, Order Denying Section 2255 Petition, CR 79; Case No. CV 00-11896, Dkt. 1.) The district court denied Mr. Day's Section 2255 motion on November 29, 2001. (Ex. F, Order Denying Section 2255 Petition.)

C. Subsequent Filings

On November 29, 2001, Mr. Day filed a motion pursuant to Federal Rule of Civil Procedure 15 for leave of court to file a supplement on newly discovered evidence. (CR 5; Ex. G, Motion for Leave of Court Pursuant to Rule 15, CR 79.) On December 11, 2001, Mr. Day filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b), which was denied on December 12, 2001. (Ex. H, Motion for Reconsideration Pursuant to Federal Rules of Civil Procedure, Rule 60(b), CR 82-84.) The district court denied a certificate of appealability on January 2, 2002, and the Ninth Circuit denied a certificate of appealability on June 13, 2002. (CR 87; CA 02-55034, Dkt. 1, 11.)

D. Second or Successive 2255 Motion

The instant Motion is filed in conjunction with a request for leave to file a second or successive petition in the Ninth Circuit.

III. ARGUMENT

Under 28 U.S.C. § 2255(a), a defendant is entitled to a resentencing when his original sentence was imposed “in violation of the Constitution or laws of the United

1 States,” or is “in excess of the maximum authorized by law.” Mr. Day is entitled to
 2 relief on all these grounds because under *Johnson v. United States*, 135 S. Ct. 2251
 3 (2015), he is now serving illegal and unconstitutional career offender and Section
 4 924(c) sentences.

5 **A. Mr. Day’s Section 924(c) Conviction, and the Resulting Seven-Year**
 6 **Mandatory Consecutive Sentence, Must Be Vacated because the**
 7 **Predicate Offense, Either Unarmed Bank Robbery or Armed Bank**
 8 **Robbery, Is Not a Crime of Violence.**

9 Section 924(c) provides for a series of graduated, mandatory consecutive
 10 sentences for using or carrying a firearm during and in relation to a “crime of violence.”
 11 18 U.S.C. § 924(c)(1)(A), (B). The term “crime of violence,” in turn, is defined as “an
 12 offense that is a felony and—”

13 (A) has as an element the use, attempted use, or threatened use of physical
 14 force against the person or property of another, or

15 (B) that by its nature, involves a substantial risk that physical force against
 16 the person or property of another may be used in the course of committing
 17 the offense.

18 18 U.S.C. § 924(c)(3). As used in this brief, subsection (A) is called the “force clause”
 19 and subsection (B) is called the “residual clause.”

20 Here, as noted, Count 3 of the Indictment charged Mr. Day with violating
 21 Section 924(c) when he “knowingly used and carried a firearm, namely, a loaded .38
 22 caliber revolver, during and in relation to a crime of violence, namely, robbery of
 23 Home Savings of America . . . in violation of Title 8, United States Code, Section
 24 2113(a), by brandishing the pistol at the employees and customers[.]” (Ex. A,
 25 Indictment, at 6.) However, the predicate offense, Count 2, actually charged Mr. Day
 26 with committing *armed* bank robbery in violation of 18 U.S.C. § 2113(a), (d)[.]” (Ex.
 27 A, Indictment, at 5.) Following *Johnson*, neither unarmed bank robbery nor armed
 28 bank robbery is a crime of violence for purposes of Section 924(c).

1 In a 1990 case, the Ninth Circuit held that unarmed bank robbery *was* a crime of
 2 violence under U.S.S.G. § 4B1.2's force clause because unarmed bank robbery required
 3 that money or property be taken through force and violence or through intimidation,
 4 which amounted to a "threatened use of physical force." *See United States v. Selfa*, 918
 5 F.2d 749, 751 (9th Cir. 1990). The decision's analysis was limited, reasoning only that
 6 acting in a way that would put an ordinary person in fear of bodily harm necessarily
 7 constituted the threatened use of force. *Id.* The Court also cited the application note to
 8 the guideline, which includes "robbery" as an enumerated offense. *Id.*

9 Similarly, in a 2000 case, the Ninth Circuit held that armed bank robbery *was* a
 10 crime of violence under the force clause of Section 924(c)(3)(A). *United States v.*
 11 *Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000). The decision's analysis was limited,
 12 reasoning only "[a]rmed bank robbery qualifies as a crime of violence because one of
 13 the elements of the offense is a taking 'by force and violence, or by intimidation.'" *Id.*
 14 (citing 18 U.S.C. § 2113(a)).

15 There is much water under the bridge since *Selfa* and *Wright* were decided,
 16 however, and intervening Supreme Court and en banc Ninth Circuit decisions have
 17 undermined their reasoning that bank robbery was a crime of violence. Specifically,
 18 the Supreme Court issued a series of cases redefining the boundaries of the force
 19 clause, such that bank robbery no longer satisfies that clause for two independent
 20 reasons. *Johnson*, moreover, removed the alternative ground on which bank robbery
 21 could have been deemed a crime of violence: that bank robbery qualified as a predicate
 22 crime of violence under the residual clause. After *Johnson*, therefore, Mr. Day no
 23 longer has a qualifying crime of violence supporting his Section 924(c) conviction and
 24 sentence.

25 **1. Neither Unarmed Bank Robbery Nor Armed Bank Robbery** 26 **Qualifies as a Crime of Violence under the Force Clause.**

27 To determine whether a predicate offense qualifies as a "crime of violence"
 28 under § 924(c), this Court must use the categorical approach. *See United States v.*

1 *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Piccolo*, 441 F.3d 1084,
 2 1086-87 (9th Cir. 2006) (“[I]n the context of crime-of-violence determinations under
 3 § 924(c), our categorical approach applies regardless of whether we review a current or
 4 prior crime.”); *see also Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)
 5 (applying categorical approach in case under ACCA, 18 U.S.C. § 924(e)). Under
 6 *Taylor*, only the statutory definitions –i.e., the elements – of the predicate crime are
 7 relevant to determine whether the conduct criminalized by the statute, including the
 8 most innocent conduct, qualifies as a “crime of violence.” *Taylor v. United States*, 495
 9 U.S. 575, 599-601 (1990).

10 Determination of whether a criminal offense is categorically a crime of violence
 11 is done by “assessing whether the ‘full range of conduct covered by [the statute] falls
 12 within the meaning of that term.’” *United States v. Grajeda*, 581 F.3d 1186, 1189 (9th
 13 Cir. 2009) (citation omitted). To do this, courts must look “at the least egregious end of
 14 [the. . . statute’s] range of conduct.” *United States v. Baza-Martinez*, 464 F.3d 1010,
 15 1014 (9th Cir. 2006) (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th
 16 Cir. 2006)). In other words, under the categorical approach, a prior offense can only
 17 qualify as a “crime of violence” if all of the criminal conduct covered by a statute—
 18 “including the most innocent conduct” —matches or is narrower than the “crime of
 19 violence” definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir.
 20 2012). If the statute punishes some conduct that would qualify as a crime of violence
 21 and some conduct that would not, it does not categorically constitute a crime of
 22 violence. *Grajeda*, 581 F.3d at 1189. In a “narrow range of cases,” if the statute is
 23 divisible as to a material element, then the court may apply the modified categorical
 24 approach by looking beyond the statutory elements to certain documents of conviction
 25 to determine whether the defendant’s conviction necessarily involved facts
 26 corresponding to the generic federal offense. *Descamps*, 133 S. Ct. at 2283-84.

27 Intervening Supreme Court and en banc Ninth Circuit precedent following *Selfa*
 28 and *Wright* holds that to be a categorical match to the terms of the force clause in

1 Section 924(c), a state statute must require proof of both intentional conduct and violent
 2 force. As to intentional conduct, in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004), the
 3 Supreme Court held that a conviction under a Florida statute prohibiting driving under
 4 the influence was not a crime of violence under the identical force clause in 18 U.S.C.
 5 Section 16(a) because the crime could be committed through mere negligence or even
 6 accidental conduct. An en banc panel of the Ninth Circuit then interpreted *Leocal* as
 7 requiring that, “to constitute a federal crime of violence an offense must involve the
 8 *intentional* use of force against the person or property of another.” *Fernandez-Ruiz v.*
 9 *Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (emphasis added); *see also*
 10 *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (citing *Leocal* and holding
 11 that the almost-identically worded force clause in the ACCA requires that “the use of
 12 force must be intentional, not just reckless or negligent”); *United States v. Serafin*, 562
 13 F.3d 1105, 1108 (9th Cir. 2009) (applying *Leocal*’s gloss on 18 U.S.C. § 16 to Section
 14 924(c)(3)); *United States v. Acosta*, 470 F.3d 132, 134-35 (2d Cir. 2006) (same).

15 “Physical force” has the meaning given to it by *Leocal* and the Supreme Court’s
 16 2010 decision in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). In
 17 *Leocal*, in addition to interpreting the *mens rea* requirement of Section 16(a), the
 18 Supreme Court also held that the phrase “physical force” in that section requires a
 19 “violent, active crime[.]” 543 U.S. at 11. The *Johnson I* Court expanded on that
 20 definition, holding that the phrase “physical force” in ACCA’s almost-identical force
 21 clause defining “violent felony” means “*violent* force—that is, force capable of causing
 22 physical pain or injury to another person.” *Johnson I*, 559 U.S. at 140.

23 A person violates the unarmed bank robbery statute if he, “by force and violence,
 24 or by intimidation, takes or attempts to take, from the person or presence of another”
 25 the property of a bank. 18 U.S.C. § 2113(a). A person violates the armed bank robbery
 26 statute if he, “by force and violence, or by intimidation, takes or attempts to take, from
 27 the person or presence of another” the property of a bank and in so doing, “assaults any
 28 person, or puts in jeopardy the life of any person by the use of a dangerous weapon or

1 device.” 18 U.S.C. § 2113(a), (d). Thus, the elements of the armed bank robbery
 2 offense are:

3 (1) the defendant took money belonging to a bank, credit union, or savings
 4 and loan, (2) by using force and violence or intimidation, (3) the deposits
 5 of the institution were insured by the Federal Deposit Insurance
 6 Corporation (“FDIC”), and (4) in committing the offense, the defendant
 7 assaulted any person, or put in danger the life of any person by the use of a
 8 dangerous weapon.

9 *Wright*, 215 F.3d at 1028. Neither unarmed bank robbery nor armed bank robbery
 10 requires an *intentional* threat of force, nor does it require a threat of *violent* force. As
 11 such, neither unarmed bank robbery nor armed bank robbery is a crime of violence
 12 under the force clause.

13 **a. Neither Unarmed Bank Robbery Nor Armed Bank**
 14 **Robbery Requires the *Intentional* Use or Threatened**
 15 **Use of Force.**

16 The first reason bank robbery is categorically overbroad and cannot support a
 17 finding that a defendant’s predicate offense is a crime of violence under the force
 18 clause is because the statute contains no requirement that a defendant have possessed
 19 any *mens rea* with respect to either his or her use of force and violence or intimidation,
 20 let alone that the defendant used force and violence or intimidation intentionally.

21 In *Carter v. United States*, 530 U.S. 255, 268 (2000), the Supreme Court held
 22 that bank robbery is a general intent crime. That is, the defendant must have
 23 “possessed knowledge with respect to the *actus reus* of the crime.” *Id.* As an example
 24 of a hypothetical defendant who should not be punished under the statute, the *Carter*
 25 Court wrote that “Section 2113(a) certainly should not be interpreted to apply to the
 26 hypothetical person who engages in forceful taking of money while sleepwalking[.]”
 27 *Id.* at 269. Following *Carter*, courts have held that the *actus reus* of bank robbery is the
 28 taking of money and therefore, the statute requires a showing only that the defendant

1 “knew he was physically taking money.” *See United States v. Yockel*, 320 F.3d 818,
 2 823 (8th Cir. 2003). Whether the defendant took money via an intentional use of force
 3 and violence or intimidation is “irrelevant.” *Id.*; *see also United States v. Kelley*, 412
 4 F.3d 1240, 1244 (11th Cir. 2005) (“[A] defendant can be convicted under section
 5 2113(a) even if he did not intend for an act to be intimidating.”). Thus, in *Yockel*, the
 6 Eighth Circuit affirmed the district court’s exclusion at trial of any evidence regarding
 7 whether the defendant intended to use force and violence or intimidation. 320 F.3d at
 8 823.

9 *Yockel* and *Kelley* are in accord with this Circuit’s longstanding, pre-*Carter*
 10 case law which also holds that, at least in cases involving intimidation, whether a
 11 defendant “specifically intended to intimidate . . . is irrelevant.” *United States v.*
 12 *Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). This holding stems from the court’s
 13 conclusion that the definition of taking, or attempting to take “‘by intimidation’ means
 14 willfully to take, or attempt to take, in such a way that would put an ordinary,
 15 reasonable person in fear of bodily harm.” *United States v. Alsop*, 479 F.2d 65, 67 n.4
 16 (9th Cir. 1973). Because this definition focuses on the effect of the accused’s actions
 17 on the victim, “[t]he determination of whether there has been an intimidation should be
 18 guided by an objective test focusing on the accused’s actions,” *not* his or her intent.
 19 *Id.*; *see also United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996) (“The
 20 intimidation element of § 2113(a) is satisfied if ‘an ordinary person in the [victim’s]
 21 position reasonably could infer a threat of bodily harm from the defendant’s acts,’
 22 whether or not the defendant actually intended the intimidation.”). Therefore, a
 23 defendant may be convicted of federal unarmed bank robbery even though he did not
 24 intend to put another in fear, but merely did some act that would put an ordinary,
 25 reasonable person in fear of bodily harm. It makes no difference in the analysis that a
 26 defendant in an armed bank robbery case uses a dangerous weapon in the course of
 27 committing the offense: whether he intentionally used the weapon is simply not an
 28 element of the crime. Therefore, a defendant may be convicted of armed bank robbery

1 even though he did not intend to put another in fear, but merely did some act involving
 2 a dangerous weapon that would put an ordinary, reasonable person in fear of bodily
 3 harm. *See United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989)
 4 (Section 2113(d) “focuses on the harms created, not the manner of creating the harm.”).

5 As a statute must require the intentional use of force in order to match the
 6 definition of “use of force” in Section 924(c)’s force clause following *Leocal* and
 7 *Fernandez-Ruiz*, and because neither Section 2113(a) nor Section 2113(a), (d) requires
 8 any such showing, *Selfa*’s and *Wright*’s conclusions that bank robbery is a crime of
 9 violence under the force clause are no longer good law. *See Miller v. Gammie*, 335
 10 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (“[T]he issues decided by the higher court
 11 need not be identical in order to be controlling. Rather, the relevant court of last resort
 12 must have undercut the theory or reasoning underlying the prior circuit precedent in
 13 such a way that the cases are clearly irreconcilable.”). Following *Leocal* and
 14 *Fernandez-Ruiz*, federal bank robbery cannot be a crime of violence under the force
 15 clause.

16 **b. Neither Unarmed Bank Robbery Nor Armed Bank**
 17 **Robbery Requires the Use or Threatened Use of**
 18 ***Violent Force*.**

19 Moreover, neither unarmed bank robbery nor armed bank robbery requires the
 20 use or threat of *violent* physical force. Nothing in the term “intimidation” requires a
 21 threat of *violent* physical force. Intimidation is satisfied even where there is no explicit
 22 threat at all, let alone the threat of violent force. For example, a simple demand for
 23 money from a bank teller will support a bank robbery conviction. *See United States v.*
 24 *Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (“Although the evidence showed that
 25 Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously
 26 held that ‘express threats of bodily harm, threatening body motions, or the physical
 27 possibility of concealed weapon[s]’ are not required for a conviction for bank robbery
 28 by intimidation.” (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th

1 Cir.1980))). But, as the Ninth Circuit recently held, an “uncommunicated willingness
 2 or readiness to use [physical] force . . . is not a threat to do so.” *United States v.*
 3 *Parnell*, 14-30208 slip op. at 8-9 (9th Cir. April 12, 2016). A threat of physical force,
 4 as would satisfy the force clause “requires some outward expression or indication of an
 5 intention to inflict pain, harm or punishment.” *Id.* Federal bank robbery has no such
 6 requirement.

7 Further, the Ninth Circuit’s definition of intimidation does not require a showing
 8 of the use or threatened use of violent physical force because placing a person “in fear
 9 of bodily harm” does not necessarily require the use or threatened use of violent
 10 physical force. On this matter, the Fourth Circuit has “recognized that, to constitute a
 11 predicate crime of violence justifying a sentencing enhancement under the Guidelines,
 12 a [predicate] offense must constitute a use or threatened use of violent force, not simply
 13 result in physical injury or death.” *Torres-Miguel*, 701 F.3d at 169; *Accord United*
 14 *States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *Chrzanoski v. Ashcroft*,
 15 327 F.3d 188, 194 (2d Cir. 2003) (“there is ‘a difference between causation of an injury
 16 and in injury’s causation by the “use of physical force””); *United States v. Perez-*
 17 *Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005); *Whyte v. Lynch*, 807 F.3d 463, 469-72
 18 (1st Cir. 2015). For example, a defendant could commit bank robbery through
 19 intimidation by threatening to poison the teller, but this would not constitute the
 20 threatened use of violent physical force, even though it would result in the teller being
 21 in fear of bodily harm. *Cf. Torres-Miguel*, 701 F.3d at 168-69 (holding that
 22 California’s criminal threats statute does not constitute a crime of violence because “a
 23 defendant can violate statutes like § 422(a) by threatening to poison another, which
 24 involves no use or threatened use of force.”); *Matter of Guzman-Polanco*, 26 I. & N.
 25 Dec. 713 (BIA 2016) (“Caesar’s death at the hands of Brutus and his fellow
 26 conspirators was undoubtedly violent; the death of Hamlet’s father at the hands of his
 27 brother, Claudius, by poison, was not.”) (quoting *Rummel v. Estelle*, 445 U.S. 263, 282
 28 n.27 (1980)).

1 With respect to the deadly weapon element of Section 2113(d), a defendant may
2 be found guilty of armed bank robbery without engaging in conduct that involves the
3 use or threat of violent physical force. For example, a defendant's mere display of or
4 reference to possession of a gun, without making any threat to use the gun, is sufficient
5 to sustain a conviction under section 2113(d). *See United States v. Jones*, 84 F.3d
6 1206, 1211 (9th Cir. 1996); *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986);
7 *Martinez-Jimenez*, 864 F.2d at 666.

8 Moreover, a defendant may be convicted of armed bank robbery even though he
9 displays or refers only to an unloaded or inoperable firearm, or even a toy resembling a
10 firearm. *See McLaughlin*, 476 U.S. 16, 17-18 (1986) (unloaded gun); *Martinez-*
11 *Jimenez*, 864 F.2d at 666-67 (inoperable gun, toy gun); *see also United States v. Boyd*,
12 924 F.2d 945, 947-48 (9th Cir. 1991) (road flare qualifies as a dangerous weapon). This
13 conduct does not involve the use or threatened use of violent force. In *McLaughlin*, the
14 Supreme Court reasoned that an unloaded gun qualified as a dangerous weapon within
15 the meaning of Section 2113(d) because "a gun is an article that is typically and
16 characteristically dangerous . . . and the law reasonably may presume that such an
17 article is always dangerous even though it may not be armed at a particular time or
18 place" and because "the display of a gun instills fear in the average citizen; as a
19 consequence, it creates an immediate danger that a violent response will ensue." 476
20 U.S. at 17-18. In other words, the *McLaughlin* court concluded that a robber's use of
21 an unloaded gun could be considered to put in danger another person's life not because
22 the robber could actually use the gun or because the gun actually posed a threat of
23 violence against anyone in the bank but merely because it was a reasonable position for
24 the law to take that all guns are dangerous, since as a general matter guns often are
25 dangerous. The Court also concluded that a robber's use of an unloaded gun could put
26 in danger another person's life not because the robber actually used or threatened to use
27 the gun in a violent, active way but only because others who saw the gun might
28 *themselves* react in a violent way. In the words of the *Martinez-Jimenez* court, "[t]he

1 *McLaughlin* opinion recognizes that the dangerousness of a device used in a bank
 2 robbery is not simply a function of its potential to injure people directly. Its
 3 dangerousness results from the greater burdens that it imposes upon victims and law
 4 enforcement officers.” 864 F.3d at 666. As these cases make clear, defendants can be,
 5 and indeed many have been, convicted of armed bank robbery without using or
 6 threatening to use violent force.

7 For these reasons, neither unarmed bank robbery nor armed bank robbery
 8 qualifies as a crime of violence under the force clause of Section 924(c). The contrary
 9 holdings in *Selfa* and *Wright* are clearly irreconcilable with *Johnson I* and *Leocal*. See
 10 *Miller*, 335 F.3d at 899-900.

11 **2. Following *Johnson*, Neither Unarmed Bank Robbery Nor Armed**
 12 **Bank Robbery Qualifies as a Crime of Violence under the**
 13 **Residual Clause because that Clause Is Void for Vagueness.**

14 Until *Johnson*, defendants like Mr. Day had little motivation to challenge *Selfa*’s
 15 and *Wright*’s force clause holdings, knowing that their bank robbery predicates would
 16 likely still be deemed crimes of violence under Section 924(c)’s residual clause.
 17 Indeed, prior to *Johnson*, the Ninth Circuit had held that various state robbery crimes
 18 were crimes of violence under the residual clause of several crime-of-violence
 19 definitions. See, e.g., *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014)
 20 (finding that California second degree robbery is a violent felony under the residual
 21 clause of ACCA, because it “certainly” is the kind of crime that presents a serious
 22 potential risk of physical injury to another); *United States v. Chandler*, 743 F.3d 648,
 23 652-55 (9th Cir. 2014) (Nevada conspiracy to commit robbery is a violent felony under
 24 the residual clause), *remanded pursuant to Johnson*, 743 F.3d 648 (9th Cir. 2015); see
 25 also *United States v. McDougherty*, 920 F.2d 569, 574 & n.3 (9th Cir. 1990) (“Clearly
 26 then, robbery as defined in California falls under 18 U.S.C. 16(b) as a felony that ‘by its
 27 nature, involves a substantial risk’ that physical force may be used”; interpreting an
 28 earlier version of the career-offender residual clause, but stating that the “result . . .

1 would be no different” under the present version of the guideline). *Johnson*, however,
 2 removed this alternative ground of justifying Mr. Day’s Section 924(c) sentence.

3 In *Johnson*, the Supreme Court declared the residual clause of the ACCA to be
 4 “unconstitutionally vague” because the “indeterminacy of the wide-ranging inquiry
 5 required by the residual clause both denies fair notice to defendants and invites
 6 arbitrary enforcement by judges.” *Johnson*, 135 S. Ct. at 2557. Thus, the Supreme
 7 Court concluded, “[i]ncreasing a defendant’s sentence under the clause denies due
 8 process of law.” *Id.* The Supreme Court held the residual clause “vague in all its
 9 applications,” *id.* at 2561, and overruled its contrary decisions in *James v. United*
 10 *States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011).
 11 *Johnson*, 135 S. Ct. at 2562-63.

12 The holding in *Johnson* invalidating the residual clause of the ACCA applies
 13 equally to the residual clause of Section 924(c). In *Dimaya v. Lynch*, 803 F.3d 1110
 14 (9th Cir. 2015), the Ninth Circuit held that the identically worded definition of a “crime
 15 of violence” in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(F),
 16 is unconstitutionally vague. *Dimaya*, 803 F.3d at 1111. The INA defines a “crime of
 17 violence” by reference to the definition in 18 U.S.C. Section 16(b). Section 16(b), like
 18 Section 924(c)(3), has a force clause and a residual clause—indeed, the provisions are
 19 identical. They each define “crime of violence” as:

20 (a) an offense that has as an element the use, attempted use, or
 21 threatened use of physical force against the person or property
 22 of another, or

23 (b) any other offense that is a felony and that, by its nature,
 24 involves a substantial risk that physical force against the
 25 person or property of another may be used in the course of
 26 committing the offense.

27 18 U.S.C. § 16; 18 U.S.C. § 924(c)(3).
 28

Although the language of Section 16(b), as incorporated into the INA, is not identical to that of ACCA's residual clause, the Ninth Circuit concluded that Section 16(b) suffered from the same constitutional defects identified in *Johnson*, and was therefore unconstitutionally vague. *Dimaya*, 803 F.3d at 1114-17; *see also United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015) (same). Because both statutes require a consideration of what kind of conduct the "ordinary case" of the crime involves, and both statutes left uncertainty about the amount of risk required, the Ninth Circuit reasoned that Section 16(b), like ACCA's residual clause, produced too much unpredictability and arbitrariness to comport with due process. *Dimaya*, 803 F.3d at 1116-17.

The same is true of the residual clause in Section 924(c)(3)(B), which the Ninth Circuit has recognized is "identical" to Section 16(b)'s residual clause. *See United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012). For interpretive purposes, the Ninth Circuit has treated Section 16(b) as the "equivalent" of Section 924(c)(3). *See United States v. Mendez*, 992 F.2d 1488, 1492 (9th Cir. 1993); *Amparo*, 68 F.3d at 1226 (relying on *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993), a Section 16(b) case, to interpret Section 924(c)(3)(B)). At least three district courts have squarely held that Section 924(c)(3)'s residual clause is unconstitutionally vague after *Johnson*. *See United States v. Lattanaphom*, __ F. Supp. 3d __, 2016 WL 393545, at *3-6 (E.D. Cal. Feb. 1, 2016); *United States v. Bell*, 2016 WL 344749, at *12-13 (N.D. Cal. Jan. 28, 2016); *United States v. Edmunson*, __ F. Supp. 3d __, 2015 WL 9311983, at *3-5 (D. Md. Dec. 30, 2015) (as amended). This Court should likewise conclude that Section 924(c)(3)(B) is unconstitutionally vague and cannot be used to support Mr. Day's Section 924(c) conviction and sentence.

Federal unarmed bank robbery and federal armed bank robbery categorically are not crimes of violence under the force clause of Section 924(c). And *Johnson* eliminated the residual clause. As such, that provision can no longer serve as an

1 alternative basis upon which to hold that Mr. Day's offense is a crime of violence. In
 2 short, following *Johnson*, Mr. Day's underlying bank robbery offense is not a crime of
 3 violence for purposes of Section 924(c).³

4 **B. Mr. Day Is Not a Career Offender Because Neither His Instant**
 5 **Conviction for Armed Bank Robbery Nor His Prior Conviction for**
 6 **Unarmed Bank Robbery Is a Crime of Violence Under *Johnson*.**

7 Mr. Day's instant conviction for armed bank robbery and his 1995 conviction for
 8 unarmed bank robbery both contributed to the court's finding that he was a career
 9 offender. (Ex. C, Sentencing Transcript, at 32-33; PSR ¶¶ 49; 71-75.) Section 4B1.1
 10 of the Sentencing Guidelines provides for enhanced guidelines ranges where (1) the
 11 defendant is 18 years or older at the time of the instant offense, (2) the instant offense is
 12 a felony "crime of violence" or "controlled substance offense," and (3) the defendant
 13 has at least two prior felony convictions of either a "crime of violence" or a "controlled
 14 substance offense." See USSG § 4B1.1(a). As set out in the career offender guideline,
 15 the term "crime of violence" is defined as:

16 [A]ny offense under federal or state law, punishable by imprisonment for a term
 17 exceeding one year, that—
 18
 19

20 ³ It should be noted that bank robbery is indivisible as between "force and
 21 violence" and "intimidation" because these are merely different means by which a
 22 defendant can commit the offense. More specifically, the jury is not called upon to
 23 parse out and unanimously agree whether the taking was (a) by force and violence or
 24 (b) by intimidation. See *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000)
 25 ("[O]ne of the elements of the offense is a taking 'by force and violence, or by
 26 intimidation.'" (quoting § 2113(a))); *United States v. Alsop*, 479 F.2d 65, 66 (9th Cir.
 27 1973) ("That the statute and the indictment use the disjunctive phrase 'by force and
 28 violence, or by intimidation' does not mean the indictment is duplicitous. Only one
 offense was charged." (citation omitted)); see also Ninth Cir. Model Criminal Jury
 Instructions § 8.162 (2015) (stating the elements of bank robbery, which include using
 "force and violence or intimidation"). Because the statute is indivisible as to this
 required element, the modified categorical approach is inapplicable. See *Descamps*,
 133 S. Ct. 2276 (2013); *United States v. Werle*, ___ F.3d ___, 2016 WL 828132, *4 (9th
 Cir. Mar. 3, 2016) ("If a statute is overinclusive and indivisible as to any required
 element, the modified categorical approach cannot be applied to that statute.").

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a). As used in this section of the brief, subsection (1) is called the “force clause”; subsection (2)’s list of offenses is called the “enumerated offenses clause,” and the remainder of subsection (2) is called the “residual clause.”

1. Neither Unarmed Bank Robbery Nor Armed Bank Robbery Is a Crime of Violence Under the Residual Clause following *Johnson*, and Neither Satisfies the Force Clause.

For the reasons just articulated in connection with the Section 924(c) argument, Mr. Day’s instant conviction for armed bank robbery and his prior conviction for unarmed bank robbery cannot serve as career-offender predicates either. Specifically, following *Johnson*, the residual clause of the career offender guideline is unconstitutionally vague. *See supra*, Part III.A.2.; *United States v. Benavides*, 617 Fed. App’x 790 (9th Cir. 2015) (vacating and remanding for resentencing in light of government’s concession that *Johnson* applies to the residual clause in the guidelines); *see also, e.g., United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (9th Cir. 2010) (internal citations omitted) (stating that the ACCA’s “violent felony” definition is “nearly identical” to section 4B1.2 and that the decision’s ACCA analysis “applies equally to § 4B1.2”); *United States v. Crews*, 621 F.3d 849, 852 n.4 (9th Cir. 2010) (“In the past we have made no distinction between the terms ‘violent felony’ and ‘crime of violence’ for purposes of interpreting the residual clause . . .”). And neither unarmed nor armed bank robbery satisfies the force clause because neither requires the intentional use of violent force. *See supra*, Part III.A.1.

**2. The Excision of the Residual Clause Takes with It the
Commentary Offense of Robbery, which Only Served to Interpret
the Residual Clause.**

The career offender designation in Mr. Day’s case cannot be salvaged under the commentary either. The application notes contained in the commentary to section 4B1.2 include a separate list of offenses that the application notes state qualify as crimes of violence. Among those offenses is “robbery.” See U.S.S.G. § 4B1.2 cmt. n.1. With the excision of the residual clause from the career offender provision, however, the offenses listed only in the commentary to the guideline are no longer of any effect either, because they only possibly interpreted the residual clause.

The Sentencing Reform Act of 1984 created the Sentencing Commission and authorized it to create “guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case.” 28 U.S.C. § 994(a)(1). Those guidelines are submitted to Congress in advance, *id.* § 994(p), making the Sentencing Commission “fully accountable to Congress.” See *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989) (upholding the Sentencing Commission against a separation of powers challenge on this ground).

Commentary, on the other hand, does not receive the same treatment as the guidelines. The Sentencing Reform Act does not explicitly authorize the creation of commentary. 28 U.S.C. § 994(a) (authorizing “guidelines” and “policy statements”); see also *Stinson v. United States*, 508 U.S. 36, 41 (1993). Nor does the Sentencing Reform Act require that commentary be submitted to Congress for approval. See 28 U.S.C. § 994(p) (requiring only that amendments to guidelines be submitted to Congress); *Stinson*, 508 U.S. at 46 (commentary “is not reviewed by Congress”). And the Sentencing Commission itself has relegated commentary to a secondary, interpretative role. See U.S.S.G. § 1B1.7 (explaining that the purpose of the commentary is to “interpret [a] guideline or explain how it is to be applied”); *United States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991), *abrogated on other grounds by*

1 *Stinson v. United States*, 508 U.S. 36 (1993) (noting the Sentencing Commission’s
2 belief that commentary “is an aid to correct interpretation of the guidelines, not a
3 guideline itself or on a par with the guidelines themselves”). Where commentary
4 assists and amplifies the text of the guideline – and where the text of the guideline “will
5 bear the construction” the commentary offers – the commentary’s interpretation of the
6 guideline is binding. *Stinson*, 508 U.S. at 46. But where commentary runs afoul of the
7 Constitution or a federal statute or where it is “plainly erroneous or inconsistent” with
8 the guideline it interprets, it is the text of the guideline, not the commentary, that must
9 control. *Id.* at 45-47; *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (stating
10 if there is a potential conflict between the text and the commentary, the text controls).

11 Because commentary is solely an interpretative aid, it “does not have
12 freestanding definitional power” and only has force insofar as it interprets or explains a
13 guideline’s text. *United States v. Leshen*, 453 Fed. App’x 408, 413-15 (4th Cir. 2011)
14 (unpublished) (finding that prior state sex offenses did not qualify as crimes of
15 violence, despite government argument that offenses fell within the commentary);
16 accord *United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) (“[The government
17 skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course,
18 that takes precedence.”). It follows that, if a portion of a guideline is excised, the
19 commentary that interpreted that portion of the guideline must go as well. Vestigial
20 commentary without a textual hook must be deemed “inconsistent” with the text under
21 *Stinson*, because its only “functional purpose” was to “assist in the interpretation and
22 application” of a rule no longer exists. *Stinson*, 508 U.S. at 45.

23 The only question that remains, then, is whether the term “robbery” in the
24 commentary interpreted the residual clause or whether it interpreted some portion of the
25 definition that remains intact. As a general matter, the offenses enumerated in the
26 commentary could only have been interpreting the residual clause; time and again, the
27 Ninth Circuit has held that the state offenses most closely related to those commentary
28 offenses do not require the use of force. *E.g., Quijada-Aguilar v. Lynch*, 799 F.3d

1 1303, 1306-07 (9th Cir. 2015) (California voluntary manslaughter does not have an
 2 element of the use of force); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th
 3 Cir. 2012) (California kidnapping does not require an element of force); *United States*
 4 *v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (Oregon kidnapping does not require an
 5 element of use of force); *see also James v. United States*, 550 U.S. 192, 206 (2007)
 6 (holding that attempt was appropriately included in the commentary enumerated
 7 offenses, “based on the Commission’s review of empirical sentencing data [which]
 8 presumably reflects an assessment that attempt crimes often pose a similar risk of
 9 injury as completed offenses”). It cannot be said, then, that the commentary offenses
 10 are there to “assist in the interpretation of” the force clause—the inclusion of those
 11 offenses is quite inconsistent with the text of the force clause.

12 Of all of the offenses listed in the commentary, robbery has perhaps the strongest
 13 tie to the residual clause. The Ninth Circuit’s generic definition of robbery is tied to the
 14 risk of harm to the person, not to any element of force. *United States v. Becerril-Lopez*,
 15 541 F.3d 881, 891 (9th Cir. 2008) (defining generic robbery as “aggravated larceny,
 16 containing at least the elements of misappropriation of property under circumstances
 17 *involving immediate danger to the person*”) (emphasis added); *see also Leshen*, 453
 18 Fed. Appx. at 415 (noting that the generic term “robbery” in the commentary
 19 interpreted the residual clause of the career offender guideline). Indeed, as noted, Ninth
 20 Circuit precedents have generally tied state robbery statutes to the residual clause of
 21 various crime-of-violence definitions. *Prince*, 772 F.3d at 1176 (finding that California
 22 second degree robbery is a violent felony under the residual clause of the Armed Career
 23 Criminal Act, because it “certainly” is the kind of crime that presents a serious potential
 24 risk of physical injury to another); *Chandler*, 743 F.3d at 652-55 (Nevada conspiracy to
 25 commit robbery is a violent felony under the residual clause), *remanded pursuant to*
 26 *Johnson*, 743 F.3d 648 (9th Cir. 2015); *see also McDougherty*, 920 F.2d at 574 & n.3
 27 (“Clearly then, robbery as defined in California falls under 18 U.S.C. 16(b) as a felony
 28 that ‘by its nature, involves a substantial risk’ that physical force may be used”;

1 interpreting an earlier version of the career-offender residual clause, but stating that the
2 “result . . . would be no different” under the present version of the guideline).

3 On the flip side, it is equally clear that the majority of Ninth Circuit state robbery
4 statutes are not crimes of violence under the force clause. *See Dixon*, 805 F.3d at 1197
5 (California robbery does not satisfy the force clause); *United States v. Alvarado-*
6 *Pineda*, 774 F.3d 1198 (9th Cir. 2014) (suggesting, without deciding, that Washington
7 robbery might not be a crime of violence under the similarly worded force clause of 18
8 U.S.C. § 16(a), because the statute required “any force or threat, no matter how
9 slight”); *United States v. Dunlap*, ___ F. Supp. 3d ___, 2016 WL 591757, at *4-6 (D.
10 Or. 2016) (Oregon robbery is not a crime of violence under the force clause).

11 Against this background, it is clear that the commentary’s reference to robbery
12 could only have interpreted the residual clause, i.e., as an example of a type of crime
13 that entails “a serious potential risk of physical injury to another.” With the residual
14 clause excised from the guideline, the commentary no longer serves to interpret or
15 amplify any provision of the remaining text, but, instead, is a contrary and plainly
16 erroneous interpretation of what remains. Once the residual clause is gone, the
17 commentary offenses—and especially robbery—must go as well.

18 The First Circuit has already reached this conclusion post-*Johnson*, holding that
19 the list of enumerated offenses contained in the guidelines commentary was
20 interpreting only the residual clause, and that post-*Johnson*, such commentary is no
21 longer of any effect. As the Court stated, “once shorn of the residual clause § 4B1.2(a)
22 sets forth a limited universe of specific offenses that qualify as a ‘crime of violence.’
23 There is simply no mechanism or textual hook in the Guideline that allows us to import
24 offenses not specifically listed therein into 4B1.2(a)’s definition of ‘crime of
25 violence.’” *See United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016). This
26 holding is in line with the interpretation many Circuits had given to the career-offender
27 commentary even before *Johnson*. *See Shell*, 789 F.3d at 345 (finding that a state
28 statute that did not meet the requirements of the *text* of § 4B1.2 could not be saved on

1 the grounds that it might fall under one of the commentary's list of offenses, noting that
2 the commentary serves "only to amplify that definition, and any inconsistency between
3 the two [must be] resolved in favor of the text") (citing *Stinson*, 508 U.S. at 43); *United*
4 *States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (rejecting the government's
5 argument that Colorado manslaughter qualifies as a crime of violence simply because it
6 is listed in the commentary and need not qualify under the definitions set out in the text;
7 "[t]o read application note 1 as encompassing non-intentional crimes would render it
8 utterly inconsistent with the language of § 4B1.2(a)"); *see also United States v. Serna*,
9 309 F.3d 859, 862 & n.6 (5th Cir. 2002) (possession of a sawed-off shotgun, while
10 listed in the commentary, must satisfy one of the definitions in the text). This Court
11 should do so as well.

12 Neither unarmed bank robbery or armed bank robbery is categorically a crime of
13 violence under any provision of the text of Section 4B1.2, and commentary cannot be
14 used to expand the definition of crime of violence beyond what the text will bear. As
15 such, it cannot serve as an alternative basis to hold that Mr. Day's convictions are
16 crimes of violence. In short, neither Mr. Day's instant conviction under 18 U.S.C. §
17 2113(a), (d) nor his 1995 conviction under 18 U.S.C. § 2113(a) is a crime of violence
18 for career offender purposes. Mr. Day must be resentenced without the career offender
19 designation.

1 **IV. CONCLUSION**

2 For the reasons set forth above, Mr. Day's sentence was "imposed in violation of
3 the Constitution or laws of the United States," and is "in excess of the maximum
4 authorized by law." Mr. Day is entitled to Section 2255 relief and should be
5 resentenced under the non-career-offender guideline and without a mandatory
6 consecutive sentence for a violation of Section 924(c).

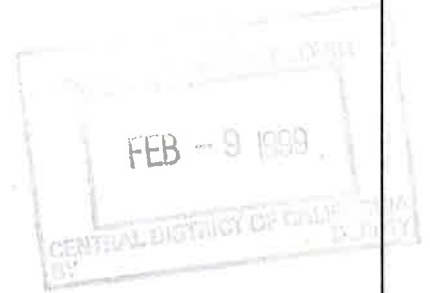
7 Respectfully submitted,

8 HILARY POTASHNER
9 Federal Public Defender

10
11 DATED: May 18, 2016

12 By /s/ Brianna Fuller Mircheff
13 BRIANNA FULLER MIRCHEFF
14 Deputy Federal Public Defender
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EXHIBIT A



UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 1998 Grand Jury

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRUCE EDWARD BELL and
MONTEZ DAY,

Defendants.

CR 99- 123

I N D I C T M E N T

[18 U.S.C. § 371: Conspiracy
to Commit Bank Robbery; 18
U.S.C. § 2113(a)(d): Armed
Bank Robbery; 18 U.S.C. §
924(c): Use of Firearm During
Crime of Violence]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 371]

A. OBJECT OF THE CONSPIRACY

Beginning on or before January 22, 1999, and continuing to
on or about January 26, 1999, in Los Angeles County, within the
Central District of California, defendants BRUCE EDWARD BELL and
MONTEZ DAY, and others known and unknown to the Grand Jury,
conspired and agreed with each other to knowingly and
intentionally commit a bank robbery of Home Savings of America,
301 South Maclay Street, San Fernando, California, in violation
of Title 18, United States Code, Section 2113(a).

AB:ab AB

1 B. MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE
2 ACCOMPLISHED

3 The object of the conspiracy was to be accomplished in
4 substance as follows:

5 1. Defendants BELL and DAY would obtain a stolen van to
6 use as a preliminary getaway vehicle from the robbery.

7 2. Defendants BELL and DAY would park a legally owned Ford
8 Expedition at a distance from Home Savings of America for use as
9 a secondary getaway vehicle from the robbery.

10 3. Defendants BELL and DAY would drive to Home Savings of
11 America in the stolen getaway van.

12 4. Defendants BELL and DAY would enter Home Savings of
13 America brandishing handguns and would order the employees and
14 customers inside to get down on the floor.

15 5. Defendants BELL and DAY would order the manager of Home
16 Savings of America to open the bank vault.

17 6. Defendants BELL and DAY would flee from Home Savings of
18 America in the stolen van.

19 7. Defendants BELL and DAY would switch from the stolen
20 van to the Ford Expedition out of sight of Home Savings of
21 America.

22 8. Defendants BELL and DAY would drive the Ford Expedition
23 to a safe place, where they would divide the money stolen from
24 Home Savings of America.

25 C. OVERT ACTS

26 In furtherance of the conspiracy and to accomplish the
27 object of the conspiracy, on or about January 26, 1999,
28 defendants BELL and DAY, and others known and unknown to the

1 Grand Jury, committed various overt acts within the Central
2 District of California, including but not limited to the
3 following:

4 1. Defendants BELL and DAY drove a stolen getaway van to
5 Home Savings of America.

6 2. Defendants BELL and DAY entered Home Savings of America
7 wearing masks and gloves, and brandishing a revolver and a
8 semiautomatic handgun.

9 3. Defendants BELL and DAY forced the employees of Home
10 Savings of America to open the vault and give defendants \$85,600
11 in cash.

12 4. One of the defendants told Home Savings of America
13 assistant manager Elizabeth Aguillon that she would be sorry if
14 she put a dye pack in with the stolen money because he and the
15 other defendant were going to take her with them when they left.

16 5. One of the defendants stopped assistant manager
17 Elizabeth Aguillon from exiting Home Savings of America by
18 grabbing her by her hair and pulling her back.

19 6. Defendants BELL and DAY fled Home Savings of America in
20 the stolen getaway van.

21 7. Defendants BELL and DAY switched getaway vehicles from
22 the stolen van to a Ford Expedition.

23 8. Defendant DAY drove the Ford Expedition at high speeds
24 to evade the police, striking other vehicles while doing so.

25 9. Defendant BELL threw the revolver out the window of the
26 Ford Expedition during the flight from the police.

27 10. Defendant DAY stopped the Ford Expedition at a mall so
28 that defendants could hide themselves from the view of a police

1 helicopter and pursuing police officers by mixing in with the
2 customers inside the mall.

COUNT TWO

[18 U.S.C. § 2113(a)(d)]

On or about January 26, 1999, in Los Angeles County, within the Central District of California, defendants BRUCE EDWARD BELL and MONTEZ DAY, by force, violence, and intimidation, knowingly took from the person or presence of another approximately \$85,600 belonging to and in the care, custody, control, management, and possession of Home Savings of America, 301 South Maclay Street, San Fernando, California, a savings and loan association the deposits of which were then insured by the Federal Deposit Insurance Corporation.

In committing said offense, defendants BELL and DAY assaulted and put in jeopardy the life of victim assistant manager Elizabeth Aguillon and others by using a handgun, a dangerous weapon and device.

COUNT THREE

[18 U.S.C. § 924(c)]

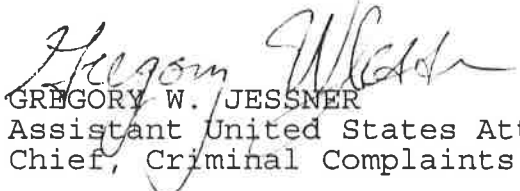
On or about January 26, 1999, in Los Angeles County, within the Central District of California, defendants BRUCE EDWARD BELL and MONTEZ DAY knowingly used and carried a firearm, namely, a loaded .38 caliber revolver, during and in relation to a crime of violence, namely, robbery of Home Savings of America, 301 South Maclay Street, San Fernando, California, in violation of Title 18, United States Code, Section 2113(a), by brandishing the pistol at the employees and customers of Home Savings of America.

A TRUE BILL

Foreperson

ALEJANDRO N. MAYORKAS
United States Attorney

GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division


GREGORY W. JESSNER
Assistant United States Attorney
Chief, Criminal Complaints

SHARON MCCASLIN
Assistant United States Attorney
Deputy Chief, Criminal Complaints

EXHIBIT B

1
2 IN THE UNITED STATES DISTRICT COURT

3 CENTRAL DISTRICT OF CALIFORNIA

4
5 THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING
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10 UNITED STATES OF AMERICA,)
11 PLAINTIFF,)
12 -v-)
13 BRUCE BELL,)
14 DEFENDANT.)
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CASE NO. CR 99-123-AHM

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COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, MAY 14, 1999

23 LYNNE SMITH
24 OFFICIAL COURT REPORTER
25 UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET, #430
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:

ALEJANDRO MAYORKAS
UNITED STATES ATTORNEY
BY: ANDREW BROWN
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:

BRIAN NEWMAN
400 CORPORATE POINTE, #805
CULVER CITY, CALIFORNIA 90230

1 FRIDAY, MAY 14, 1999; LOS ANGELES, CALIFORNIA

2 -000-

3 THE CLERK: Item 1, CR 99-123-AHM, U.S.A. versus Bruce
4 Bell and Montez Day.

5 Appearances, counsel.

6 MR. BROWN: Good afternoon, Your Honor. Andrew Brown
7 for the government.

8 MR. NEWMAN: Good afternoon, Your Honor. Brian Newman
9 for Bruce Bell. And I do apologize for being late.

10 THE COURT: You had an important event, one of your
11 kids had a social event at school?

12 MR. NEWMAN: Yes, Your Honor.

13 THE COURT: That's very important.

14 MR. NEWMAN: It is. It's something that we do as a
15 support group for the school a couple times a year and it's
16 something that I'm active in.

17 THE COURT: How old is this child?

18 MR. NEWMAN: Eight.

19 THE COURT: That's priority. Unless there are
20 compelling circumstances, I understand why. No problem.

21 MR. MAYOCK: Good afternoon, Your Honor. Michael
22 Mayock with Mr. Montez Day.

23 THE COURT: Nice to see you Mr. Mayock. We were
24 colleagues in the U.S. attorney's office. You should know that.
25 We're here for a change of plea to a single indictment in which

1 Mr. Bell and Mr. Day are both named as defendants; is that
2 correct?

3 MR. NEWMAN: Correct.

4 MR. MAYOCK: Correct, Your Honor.

5 THE COURT: Is there a plea agreement for one but not
6 for the other?

7 MR. BROWN: Yes, Your Honor.

8 THE COURT: Is there any reason there can't be
9 reference to that agreement?

10 MR. BROWN: No, Your Honor.

11 THE COURT: The plea agreement for Mr. Bell refers to
12 Counts 2 and 3. To which count or counts is Mr. Day intending
13 to change his plea?

14 MR. BROWN: One, two and three.

15 THE COURT: All three. Is that correct, all three?

16 MR. BROWN: Yes, Your Honor.

17 THE COURT: Okay. Let me address my remarks to Mr. Day
18 and Mr. Bell for a second. This procedure of changing a plea
19 and entering a guilty plea is elaborate. Certain things have to
20 be dealt with. A certain format has to be followed. I'm going
21 to explain it.

22 I need your cooperation and I need your careful
23 attention. I will be asking each of you a number of questions.
24 But at some point in the proceedings I will be telling both of
25 you the identical thing such as what rights you have that you

1 will be giving up.

2 To save time I will say certain things once that apply
3 to both and then I will ask each of you separately whether you
4 enter that plea. If either of you, once you talk to your
5 respective lawyers or raise a question with me or otherwise
6 pause in what we're doing, just let me know and you will have a
7 right to do that. But otherwise work with me. Please be very
8 attentive because I want to make sure you know what you're doing
9 and the consequences to you of what you are planning to do.

10 Is that understood by both of you? Mr. Bell?

11 DEFENDANT BELL: Right.

12 THE COURT: Mr. Day?

13 DEFENDANT DAY: Yes, Your Honor.

14 THE COURT: The first thing to remember is that you can
15 change your mind before we get to the finish line. And by the
16 finish line, I don't mean to minimize the importance of what
17 we're doing with these changes of plea being accepted and
18 entered. Once that happens there is no going back on that. You
19 will be found guilty and what will remain will be sentencing
20 basically. So until we get there, you have a right to change
21 your mind. But it may be something that you have already
22 committed to do and that's fine also.

23 At the outset I'm going to ask the clerk to swear each
24 of you in. She'll ask you preliminary questions and then I will
25 turn to the questions and the advice of rights that I will be

1 giving to each of you.

2 THE CLERK: Mr. Bell, is Bruce Bell your true and full
3 name?

4 DEFENDANT BELL: Yes, it is.

5 THE CLERK: It has been indicated that you wish to
6 withdraw your previously entered pleas of not guilty to Counts 2
7 and 3 of the indictment and tender a different plea. Do you now
8 withdraw your previously entered plea of not guilty to Counts 2
9 and 3 of the indictment?

10 DEFENDANT BELL: Yes.

11 THE CLERK: How do you now plead to the indictment
12 filed against you, guilty or not guilty?

13 DEFENDANT BELL: Guilty.

14 THE CLERK: How do you now plead to Count 3 of the
15 indictment, guilty or not guilty?

16 DEFENDANT BELL: Guilty.

17 THE CLERK: Mr. Day, is Montez Day your true and full
18 name?

19 THE DEFENDANT: Yes.

20 THE CLERK: It has been indicated that you wish to
21 withdraw your previously entered pleas of not guilty to Counts
22 1, 2 and 3 of the indictment and enter a different plea. Do you
23 now withdraw your previously entered plea of not guilty to
24 Counts 1, 2 and 3 of the indictment?

25 DEFENDANT DAY: Yes.

1 THE CLERK: How do you now plead to Count 1 of the
2 indictment filed against you, guilty or not guilty?

3 DEFENDANT DAY: Guilty.

4 THE CLERK: How do you now plead to Count 2, guilty or
5 not guilty?

6 DEFENDANT DAY: Guilty.

7 THE CLERK: How do you now plead to Count 3, guilty or
8 not guilty?

9 DEFENDANT DAY: Guilty.

10 THE CLERK: The court will ask you the nature of your
11 pleas under oath. Would each of you please raise your right
12 hand to be sworn.

13 (DEFENDANTS SWORN)

14 THE COURT: Okay. Let me start with you, Mr. Bell.
15 Tell me how you're feeling right now.

16 DEFENDANT BELL: How do I feel? I feel all right.

17 THE COURT: Are you dealing with any physical or
18 emotional illnesses or conditions that might affect your ability
19 to make a decision, a sensibly formed decision?

20 DEFENDANT DAY: No.

21 THE COURT: Are you under any treatment for any
22 condition today?

23 DEFENDANT BELL: No, I'm not.

24 THE COURT: Any illness?

25 DEFENDANT BELL: No.

1 THE COURT: Have you taken any medicines or drugs
2 today?

3 DEFENDANT BELL: No.

4 THE COURT: Alcoholic beverages?

5 DEFENDANT BELL: No.

6 THE COURT: Are you currently under any doctor's care?

7 DEFENDANT BELL: No.

8 THE COURT: Tell me please what your age is.

9 DEFENDANT BELL: 46.

10 THE COURT: And your level of education?

11 DEFENDANT BELL: High school.

12 THE COURT: High school?

13 DEFENDANT BELL: Yes.

14 THE COURT: Did you finish?

15 THE DEFENDANT: I got a G.E.D.

16 THE COURT: Have you been under psychiatric care of any
17 kind?

18 DEFENDANT BELL: No, I haven't.

19 THE COURT: Are you a citizen of the United States?

20 DEFENDANT BELL: Yes.

21 THE COURT: Okay. Now I'm going to ask the same
22 questions to you, Mr. Day. Then I will turn to some things that
23 apply to both of you.

24 How are you feeling today?

25 DEFENDANT DAY: I'm feeling okay.

1 THE COURT: Have you taken any medicines or drugs
2 today?

3 DEFENDANT BELL: No.

4 THE COURT: Any alcoholic beverages or any other kind
5 of drug?

6 DEFENDANT DAY: No, sir.

7 THE COURT: Are you under any doctor's care today?

8 DEFENDANT DAY: No, sir.

9 THE COURT: Please tell me your age.

10 DEFENDANT DAY: 28.

11 THE COURT: And your level of education?

12 DEFENDANT DAY: G.E.D., pre-college.

13 THE COURT: Have you been under any psychiatric or
14 psychological care?

15 DEFENDANT DAY: Yes.

16 THE COURT: Are you currently receiving psychological
17 or psychiatric care?

18 DEFENDANT DAY: No.

19 THE COURT: Do you feel you're in condition and a
20 position today to understand what is going on?

21 DEFENDANT DAY: Yes.

22 THE COURT: Are you also a citizen of the United
23 States?

24 DEFENDANT DAY: Yes.

25 THE COURT: Okay. Mr. Bell, did you receive a copy of

1 the indictment?

2 DEFENDANT BELL: Yes, I have.

3 THE COURT: Did you also, Mr. Day?

4 DEFENDANT DAY: Yes, sir.

5 THE COURT: Mr. Bell, did you read it?

6 DEFENDANT BELL: Yes.

7 THE COURT: Did you read it, Mr. Day?

8 DEFENDANT DAY: I did, yes.

9 THE COURT: Okay. Do you each believe that you
10 understand the charges that are in that indictment? First you,
11 Mr. Bell.

12 DEFENDANT BELL: Yes.

13 THE COURT: Mr. Day?

14 DEFENDANT DAY: Yes.

15 THE COURT: Let me tell you now collectively, jointly,
16 each of you, certain things which I think you already know and
17 in the case of Mr. Bell which are actually placed in writing in
18 the plea agreement. These are rights that you will be giving
19 up. They were mentioned I think in the arraignment when you
20 were first arraigned on these charges. But it's important that
21 you understand these are your rights.

22 By pleading guilty, with the exception of the right to
23 counsel, you will be giving up these rights. Each time I
24 mention a right, I will ask you in turn whether you wish to give
25 it up. So let me begin.

1 You each have a constitutional right to a speedy and
2 public trial by jury. Do you wish to give up that right,
3 Mr. Bell?

4 DEFENDANT BELL: Yes.

5 THE COURT: Do you, Mr. Day?

6 DEFENDANT DAY: Yes.

7 THE COURT: You each have a right to be presumed
8 innocent and to have the burden shifted to the government to
9 prove you guilty beyond a reasonable doubt. Neither of you has
10 to prove yourself innocent. The burden is always upon the
11 government.

12 Do you wish to give up that right, Mr. Bell?

13 DEFENDANT BELL: Yes.

14 THE COURT: Mr. Day?

15 DEFENDANT DAY: Yes.

16 THE COURT: Each of you, if you went to trial, would
17 have the right to see and examine the evidence and to
18 cross-examine the witnesses. Do you wish to give up that right,
19 Mr. Bell?

20 DEFENDANT BELL: Yes.

21 THE COURT: Do you, Mr. Day?

22 DEFENDANT DAY: Yes.

23 THE COURT: At all times you would have the right
24 against self incrimination. And as I think you undoubtedly
25 know, that means the right to refuse to testify. No one can

1 compel you to give information that may hurt you. You could
2 always remain silent. Do you wish to give up that right?

3 DEFENDANT BELL: Yes.

4 THE COURT: Do you, Mr. Day?

5 DEFENDANT DAY: Yes.

6 THE COURT: The other side of the coin is true also.
7 If you do take the case to trial, each of you could choose to
8 testify, go up to the witness stand and give your versions of
9 the facts and ask the jury to accept your view. Do you wish to
10 give up that right, Mr. Bell?

11 DEFENDANT BELL: Yes.

12 THE COURT: Do you, Mr. Day?

13 DEFENDANT DAY: Yes, sir.

14 THE COURT: You could also, if the case went to trial,
15 use the subpoena power of the court to compel other witnesses to
16 come to court and if they were in a position to do so, to
17 testify on your behalf. Did you wish to give up that right,
18 Mr. Bell?

19 DEFENDANT BELL: Yes.

20 THE COURT: Do you, Mr. Day?

21 DEFENDANT DAY: Yes.

22 THE COURT: If you took the case to trial and were
23 found guilty, you could appeal the verdict of guilt. But if you
24 plead guilty, you won't be able to do that. Do you understand
25 that?

1 DEFENDANT BELL: Yes.

2 THE COURT: Are you willing to give up that right?

3 DEFENDANT BELL: Yes.

4 THE COURT: And you, Mr. Day?

5 DEFENDANT DAY: Yes.

6 THE COURT: Each of you will continue to have the right
7 to counsel and if you can't afford counsel to have counsel
8 appointed at the public's expense to continue to represent you.

9 Mr. Newman, is it your intention to continue to
10 represent Mr. Bell?

11 MR. NEWMAN: It is, Your Honor.

12 THE COURT: Mr. Mayock?

13 MR. MAYOCK: Yes, Your Honor.

14 THE COURT: Okay. Those are rights that neither of you
15 will lose. Until the completion of this case and through the
16 point of sentencing, each of you will continue to enjoy that
17 right to effective counsel.

18 Now both of you being citizens, and I don't know
19 anything about your background so some of this may apply, maybe
20 not, but I want you to understand by pleading guilty to those
21 charges you are more likely than not going to lose certain civil
22 rights that citizens otherwise enjoy: The right to vote, the
23 right to run for public office, the right to serve on a jury,
24 the right to purchase and possess firearms. You will be giving
25 up all those rights.

1 Do you wish to do that, Mr. Bell?

2 DEFENDANT BELL: Yes.

3 THE COURT: Do you, Mr. Day?

4 DEFENDANT DAY: Yes.

5 THE COURT: Does either of you have any questions about
6 the rights that I just spelled out for you?

7 DEFENDANT BELL: No, sir.

8 DEFENDANT DAY: No, sir.

9 THE COURT: Do you understand, Mr. Bell, that each of
10 the two counts to which you're pleading guilty is a felony,
11 separate felony?

12 DEFENDANT BELL: Yes.

13 THE COURT: All the three counts you're pleading guilty
14 to, Mr. Day, those are felonies too. Do you understand that?

15 DEFENDANT DAY: Yes.

16 THE COURT: Okay. Now I'm going to ask that Mr. Brown
17 set forth first the elements of these offenses. I'm going to
18 summarize the offenses as paraphrased in the indictment. I'm
19 going to ask Mr. Brown to summarize what the elements are, what
20 the government would have to prove.

21 I will ask him to do it for all three counts. And then
22 I will address each of you. Then I will go back to you, Mr.
23 Brown, and ask you to summarize what the evidence would be,
24 first against Mr. Bell and then against Mr. Day.

25 Now the indictment in case Number 99-123 is only a

1 single indictment. It wasn't superseding, was it?

2 MR. BROWN: That's correct, Your Honor.

3 THE COURT: Okay. In Count 1 the indictment alleges
4 violation of 18 USC Section 371, conspiracy to commit a bank
5 robbery. This is particularly applicable to you, Mr. Day,
6 because you're pleading guilty to that count.

7 It says beginning on or before January 22 of this year,
8 1999, and continuing to on or about January 26 of '99, both you
9 and Mr. Bell and others known and unknown to the grand jury
10 conspired and agreed with each other to commit a bank robbery of
11 Home Savings in San Fernando, California.

12 On Page 2 it describes the means by which this
13 agreement, this conspiracy was to be accomplished and it sets
14 forth eight ways in which the object of the conspiracy was to be
15 accomplished. It claims that both defendants would obtain a
16 stolen van to use as a preliminary getaway vehicle; that both
17 defendants would park illegally a Ford Expedition a distance
18 from Home Savings for use as a secondary getaway vehicle.

19 That both defendants would drive to Home Savings in the
20 stolen van. They would enter Home Savings brandishing guns,
21 handguns, would order the employees and customers inside to get
22 down on the floor. Both defendants would order the manager of
23 Home Savings to open the bank vault and then they would flee
24 from Home Savings in a stolen van. After that it's alleged that
25 both defendants would switch from the stolen van to the Ford

1 Expedition and drive the Ford Expedition to a safe place and
2 divide the money.

3 The first counts also alleges that they commit various
4 fraudulent and overt acts to carry out this plan. And they
5 include driving a stolen getaway van to Home Savings. That's
6 something that's alleged as to both defendants. Both defendants
7 entering the bank wearing masks and hand gloves and brandishing
8 a revolver, semi-automatic handgun. Both defendants forced the
9 employees to open the vault and give them over \$85,000.

10 And I'm going to focus on the ones you're specifically
11 mentioned in Mr. Bell -- excuse me, Mr. Day. Both defendants
12 fled Home Savings in the stolen getaway van. One of the
13 defendants -- actually I should mention this -- told by the
14 assistant manager that she was sorry she put a dye pack in with
15 the stolen money and prevented her from exiting the bank by
16 grabbing her hair and pulling her back.

17 Attention now to you, Mr. Day, drove the Ford
18 Expedition to avoid the police and you stopped the Ford
19 Expedition at a mall so defendants could hide themselves from
20 the view of a helicopter, police helicopter, and from pursuing
21 police officers. All of that is spelled out in the first count.

22 The second count says that 18 USC Section 2113,
23 Subsections A and D was violated in that both defendants by
24 force, violence, intimidation knowingly took from a person
25 approximately \$85,600 belonging to Home Savings, San Fernando

1 branch, Home Savings then insured by the FDIC, Federal Deposit
2 Insurance Corporation; that both defendants assaulted and put in
3 jeopardy the life of the victim assistant manager and others by
4 using a handgun.

5 Finally the third count says that both defendants
6 violated 18 USC Section 924(c) by knowingly using and carrying a
7 firearm, namely a loaded .38 caliber revolver during the
8 commission of A crime of violence of robbing Home Savings.

9 Now Mr. Brown, would you as to Count 1, just stop after
10 you do it for Count 1, describe what the elements of the offense
11 of conspiracy in violation 18 USC 371 would be.

12 MR. BROWN: In order for defendant Day to be proved
13 guilty of conspiracy, he must have, on or about the dates
14 charged in the indictment, agreed with another person to commit
15 the bank robbery. Second, he must have become a member of the
16 conspiracy knowing of its object and intending to help
17 accomplish it.

18 And third, at least one of the members of the
19 conspiracy must have performed at least one overt act for the
20 purpose of carrying out the conspiracy.

21 THE COURT: Now again, in order to make this clear and
22 simple, I would appreciate it if you would turn to, Mr. Brown,
23 only focusing on Count 1 and only as to Mr. Day and summarize
24 what the evidence would be that the government would introduce
25 before the jury.

1 MR. BROWN: The government would prove that on or about
2 January 22nd, 1999, the day on which the getaway van was stolen,
3 and continuing through January 26th, 1999, the date on which the
4 bank robbery was committed in Los Angeles County, defendant
5 Montez Day agreed with defendant Bruce Bell to commit an armed
6 takeover robbery of Home Savings of America in San Fernando,
7 California, the deposits of which were then insured by the
8 Federal Deposit Insurance Corporation.

9 THE COURT: Mr. Day, I have asked the prosecutor to
10 focus only on Count 1 because that's a count that you are
11 planning to change your plea to. Did you hear what he said?

12 DEFENDANT DAY: Yes.

13 THE COURT: Did you understand it?

14 DEFENDANT DAY: Yes, sir.

15 THE COURT: So what he did was describe technically
16 what has to be proven to convict someone of conspiracy. He
17 summarized what the government would introduce --

18 MR. BROWN: Your Honor, I omitted one element. The
19 government would show that the overt act occurred and that is
20 established by the defendants entering the bank.

21 THE COURT: Do you have -- would you be putting on
22 witnesses, eyewitnesses?

23 MR. BROWN: Yes, Your Honor. And surveillance photos.

24 THE COURT: Did the eyewitnesses identify these
25 defendants through lineups or through pictures?

1 MR. BROWN: No, they were wearing masks. The
2 identifications would have been made based on clothing and
3 witnesses seeing the defendants fleeing and the police following
4 them until their vehicle was stopped. The stolen van was found
5 and one of the weapons was later found.

6 THE COURT: Is it correct that each of the defendants
7 was caught and arrested shortly after they fled the bank?

8 MR. BROWN: Yes, Your Honor.

9 THE COURT: In possession of the money?

10 MR. BROWN: Yes, Your Honor.

11 THE COURT: Let's focus back on you, Mr. Day. Do you
12 agree with what the prosecutor said as far as the summary of the
13 proof that he would introduce? Let me explain what the question
14 is. It may be the question wasn't very clear.

15 In order for this proceeding to be conducted properly,
16 the record has to show that there's a factual basis. It's not
17 enough for someone to come in and say I plead guilty, I want to
18 get the benefit of whatever deal or whatever impact pleading
19 guilty may be to the person that's done what he's accused of.

20 I asked Mr. Brown to summarize what the evidence would
21 be hoping that you would listen to it and be able to tell me
22 whether in fact you would agree that those are things that
23 happened. If you do agree, if you did the things that he's
24 talking about, then the record will show a factual basis and I
25 will be entitled to accept your guilty plea. Does that help you

1 understand what I'm driving at?

2 DEFENDANT DAY: Yes.

3 THE COURT: Do you agree with what Mr. Brown said?

4 DEFENDANT DAY: Yes.

5 THE COURT: Did you in fact do those things?

6 DEFENDANT DAY: Yes, Your Honor.

7 THE COURT: Okay. Now Mr. Brown, do the same thing,
8 but this is going to apply to both Mr. Bell and Mr. Day.

9 They're both planning to plead to each of Counts 2 and 3. So
10 set forth what the elements of Count 2 are and what the evidence
11 would be.

12 MR. BROWN: In order to be guilty of armed bank
13 robbery, the defendant must have taken from a teller money
14 belonging to a bank. The defendant must have used force and
15 violence or intimidation in doing so. The deposits of the bank
16 must have been insured by the Federal Deposit Insurance
17 Corporation at that time. And finally, the defendant must have
18 intentionally made a show of force that caused the teller to
19 fear bodily harm by using a dangerous weapon.

20 If this case went to trial, the government would prove
21 that defendants Bruce Bell and Montez Day entered the Home
22 Savings of America in San Fernando, California on January 26th,
23 1999 and that defendant Montez Day brandished a semi-automatic
24 pistol while defendant Bruce Bell brandished a loaded .38
25 caliber revolver. Defendants Montez Day and Bruce Bell forced

1 the assistant manager Elizabeth Aguilon to open the bank vault
2 and took from the bank vault approximately \$85,600 in cash.

3 THE COURT: Mr. Bell, do you understand what Mr. Brown
4 said?

5 DEFENDANT BELL: Yes.

6 THE COURT: Did you in fact do the things he just
7 described?

8 DEFENDANT BELL: Yes.

9 THE COURT: How about you, Mr. Day, do you understand
10 what he said?

11 DEFENDANT DAY: Yes.

12 THE COURT: Did you do those things?

13 DEFENDANT DAY: Yes.

14 THE COURT: Let me hear Count 3, Mr. Brown. Summarize
15 what the elements are and what the evidence would be, please.

16 MR. BROWN: In order to be guilty of using or carrying
17 a firearm during a crime of violence, the following must be
18 true. One, defendant committed the crime of violence charged in
19 the indictment, bank robbery in this case; two, the defendant
20 knowingly used or carried a firearm; three, defendant used or
21 carried the firearm during and in relation to the crime of
22 violence.

23 Because the 924(c) charge in this case carries a
24 mandatory minimum sentence of seven years, the government would
25 also have to prove the defendant brandished the firearm.

1 Now Your Honor, because the firearm charged was only
2 possessed by defendant Bell and the government is relying on
3 Pinkerton liability as to defendant Day for that firearm, I'd
4 also like to put on the record the elements of Pinkerton
5 liability.

6 THE COURT: I want Mr. Day to pay attention to this.
7 Is it an accurate way of paraphrasing what you're about to do,
8 Mr. Brown, that you're saying the indictment singles out only
9 the weapon that Mr. Bell actually carried, but that you have a
10 basis to obtain a conviction of guilt as to Mr. Day?

11 MR. BROWN: That's correct, Your Honor.

12 THE COURT: It's a legal basis called Pinkerton?

13 MR. BROWN: Yes. In order, if you have a criminal
14 agreement with somebody to commit an act, there are certain
15 instances in which you will be liable for the crime, the acts
16 committed by the person you're conspiring with. That is called
17 Pinkerton liability. And if the acts of your partner in crime
18 are reasonably foreseeable and a necessary and natural
19 consequence of your criminal agreement, you will be liable for
20 those acts as well. Shall I specify the elements, Your Honor?

21 THE COURT: Yes.

22 MR. BROWN: In order for the defendant to be guilty of
23 a crime committed by his co-conspirator, the following must be
24 true. One, defendant's co-conspirator committed a crime such as
25 a bank robbery; two, that the co-conspirator was a member of the

1 conspiracy charged in Count 1 of the indictment; three, that the
2 co-conspirator committed the crime in furtherance of the
3 conspiracy; four, defendant was a member of the conspiracy on
4 the date that the co-conspirator committed the crime; and five,
5 the crime fell within the scope of the conspiracy and could
6 reasonably have been foreseen to be a necessary and natural
7 consequence of the conspiracy.

8 Shall I proceed with the factual basis, Your Honor?

9 THE COURT: Yes.

10 MR. BROWN: On January 26, 1999, defendants Bruce Bell
11 and Montez Day entered the Home Savings of America in San
12 Fernando which was then insured by the Federal Deposit Insurance
13 Corporation. Bruce Bell brandished a loaded .38 caliber
14 revolver. Bruce Bell's brandishing of a .38 caliber revolver
15 was within the scope of Montez Day and Bruce Bell's unlawful
16 agreement and could reasonably have been foreseen by defendant
17 Montez Day as a necessary and natural consequence of that
18 agreement. And the defendants used that weapon in order to rob
19 the bank on that day.

20 THE COURT: Okay. I want to turn to you first,
21 Mr. Day. There were a lot words Mr. Brown used. Were you able
22 to understand what he was saying as to why you could be found
23 guilty of what Mr. Bell did as to his .38 caliber revolver?

24 DEFENDANT DAY: Yes.

25 THE COURT: Okay. Mr. Bell, did you do the things that

1 Mr. Brown referred to in connection with Count 3 relating to the
2 use of a firearm?

3 DEFENDANT BELL: Yes.

4 THE COURT: Did you, Mr. Day?

5 DEFENDANT DAY: Yes.

6 THE COURT: All right. And I want to address some
7 questions next to you, Mr. Bell, because I have been informed
8 and have been given a copy of the plea agreement. And do you
9 have this with you, Mr. Newman?

10 MR. NEWMAN: I do, Your Honor.

11 THE COURT: Okay. Would you turn to Page 8, please.

12 Mr. Bell, on Page 8 is that your signature?

13 DEFENDANT BELL: Yes, it is.

14 THE COURT: Did you sign that agreement in the presence
15 of Mr. Newman?

16 DEFENDANT BELL: Yes.

17 THE COURT: Before you signed it, did you read it?

18 DEFENDANT BELL: Yes.

19 THE COURT: Did you understand it?

20 DEFENDANT BELL: Yes.

21 THE COURT: As far as you're concerned, does this plea
22 agreement contain the entire terms of the agreement between you
23 on the one hand and the U.S. attorney's office on the other?

24 DEFENDANT BELL: Yes.

25 THE COURT: Has anyone made you any promises or

1 representations of guarantees other than whatever may be set
2 forth in this plea agreement?

3 DEFENDANT BELL: No.

4 THE COURT: Has anyone made any threats to you that
5 prompted you to plead guilty this afternoon?

6 DEFENDANT BELL: No.

7 THE COURT: Did anyone tell you about or promise to you
8 what specific sentence would be imposed?

9 DEFENDANT BELL: No.

10 THE COURT: Do you have any other agreement with the
11 government besides what is now in your hands as a written plea
12 agreement?

13 DEFENDANT BELL: No.

14 THE COURT: Did anyone promise you any leniency or
15 probation or any kind of outcome once the day of sentencing
16 comes?

17 DEFENDANT BELL: No.

18 THE COURT: Are you presently on parole?

19 DEFENDANT BELL: Yes.

20 THE COURT: Have you discussed with your lawyer the
21 impact on your parole of being found guilty today, the impact on
22 the offense for which you're on parole?

23 DEFENDANT BELL: Yes.

24 THE COURT: Are you involved in any court proceedings?

25 DEFENDANT BELL: No.

1 THE COURT: Have you been advised of the maximum
2 penalty under the law?

3 DEFENDANT BELL: Yes, I have.

4 THE COURT: For these offenses, at least for Count 3,
5 there's also a minimum penalty; is that correct?

6 MR. BROWN: Yes, Your Honor.

7 THE COURT: Both of you should listen because I'm now
8 going to ask Mr. Brown to place on the record both the maximum
9 and minimum penalties.

10 MR. BROWN: The maximum penalty for the conspiracy
11 count, Count 1, is five years imprisonment, a three-year period
12 of supervised release, a fine of \$250,000 and a mandatory
13 special assessment of \$100.

14 The maximum sentence the court could impose for the
15 armed bank robbery, Count 2, is 25 years imprisonment, a
16 five-year period of supervised release, a fine of \$250,000 and a
17 mandatory special assessment of \$100.

18 The statutory maximum sentence the court could impose
19 for violation of 924(c), the third count, is life imprisonment,
20 a five-year period of supervised release, a fine of \$250,000 and
21 a mandatory special assessment of \$100.

22 The statutory mandatory minimum sentence that the court
23 must impose for Count 3 and the 924(c) charge is a seven-year
24 term which must run consecutive to any other sentence of
25 imprisonment. Therefore, the total maximum sentence for all of

1 these offenses to which defendant Montez Day is pleading guilty
2 is life imprisonment, a five-year period of supervised release,
3 a fine of \$750,000 and a mandatory special assessment of \$300.

4 The maximum total sentence for the two offenses to
5 which defendant Bruce Bell is pleading guilty is life
6 imprisonment, a five-year period of supervised release, a fine
7 of \$500,000 and a mandatory special assessment of \$200.

8 THE COURT: Okay. Mr. Bell, continuing with you for a
9 moment. You've heard some reference to supervised release.
10 This is something that applies to both of you. Do you both
11 understand that in the federal system there's no longer such a
12 thing as parole? If someone sentenced to prison serves out the
13 term of sentence except for the reduction that may be earned for
14 good time or good behavior and then when that person is released
15 from prison he may be subjected to something called supervised
16 release which is basically supervision that has conditions,
17 restrictions, terms and limitations. If a person violates the
18 terms of his supervised release, he can be sent back to prison
19 for the entire amount of the period of supervised release.

20 Do you understand that, Mr. Bell?

21 DEFENDANT BELL: Yes, I do.

22 THE COURT: Do you understand that, Mr. Day?

23 DEFENDANT DAY: Yes, sir.

24 THE COURT: Now there's also been some reference at
25 least in the plea agreement I think and perhaps there's

1 something been said today about the Sentencing Commission
2 guidelines. I want to tell you both about those. There will be
3 some things you and I will talk about directly with you in a
4 minute, Mr. Day. I will be getting to you as well, Mr. Bell.

5 Now this again applies to both of you. Under the
6 federal system that you're now part of there are sentencing
7 guidelines which are issued by something called the Sentencing
8 Commission. They contain an analysis of the relevant facts and
9 those include the nature of the offense, the criminal history of
10 the defendant, whether the defendant accepted responsibility for
11 what he was accused of, whether in the alternative he obstructed
12 justice; a lot of factors. They are all taken into account by
13 the probation office.

14 The probation office applies these guidelines issued by
15 the commission and comes up with a guideline range expressed in
16 months, how many months can the defendant be sentenced. The low
17 end and the high end are included. But I'm not bound by these
18 guideline determinations. Under certain circumstances I impose
19 a tougher sentence, a longer sentence, or I can impose a shorter
20 sentence. You each will get through your lawyers and directly
21 in your own right a copy of the presentence report which is
22 prepared by the probation office and which deals with these
23 guidelines.

24 Each of you through your lawyer will have a chance to
25 challenge it or add to it or change it. It eventually comes to

1 me and then I will review it. But I again want to make sure you
2 each understand that I'm not bound by it.

3 Do you understand that, Mr. Bell?

4 DEFENDANT BELL: Yes, sir.

5 THE COURT: Are there any questions you have at the
6 moment about what I have said about the sentencing guidelines?

7 DEFENDANT BELL: No.

8 THE COURT: Mr. Day, do you understand what I said
9 about the guidelines?

10 DEFENDANT DAY: Yes, sir.

11 THE COURT: Do you have any questions about those
12 guidelines?

13 DEFENDANT DAY: No, sir.

14 THE COURT: Okay. Now Mr. Brown, in the plea agreement
15 from Mr. Bell is there any provision relating to appeal?

16 MR. BROWN: No, Your Honor.

17 THE COURT: Okay. And there's no agreement restricting
18 Mr. Day; is that correct, Mr. Mayock?

19 MR. MAYOCK: That's correct, Your Honor.

20 THE COURT: Each of you needs to understand that when I
21 finally do impose sentence, if we get to that point, if I'm
22 wrong you can appeal what I did. You may file your appeal
23 through your lawyer, challenge the sentence, not the finding of
24 guilty, not the guilty verdict, but the sentence.

25 Do you understand that, Mr. Bell?

1 DEFENDANT BELL: Yes, sir.

2 THE COURT: Do you, Mr. Day?

3 DEFENDANT DAY: Yes, sir.

4 THE COURT: Okay. Turning to you for a minute,
5 Mr. Bell, have you had sufficient time to discuss this case with
6 Mr. Newman?

7 DEFENDANT BELL: Yes.

8 THE COURT: Are you satisfied that he's fully
9 considered any defenses you might have to the charges?

10 DEFENDANT BELL: Yes, I am.

11 THE COURT: Are you satisfied with his representation
12 of you?

13 DEFENDANT BELL: Yes.

14 THE COURT: Has he advised you of the nature of these
15 charges and how the factors that go into the sentence generally
16 work?

17 DEFENDANT BELL: Yes.

18 THE COURT: Have you told him all the facts and
19 circumstances surrounding this case?

20 DEFENDANT BELL: Yes.

21 THE COURT: Okay. Mr. Day, same question. I'm asking
22 now a few questions about Mr. Mayock. Have you had a sufficient
23 opportunity to discuss this case with him?

24 DEFENDANT DAY: Yes.

25 THE COURT: Are you satisfied with his representation

1 of you?

2 DEFENDANT DAY: Yes.

3 THE COURT: Has he told about any defenses you might
4 have to these charges?

5 DEFENDANT DAY: Yes.

6 THE COURT: Has he explained the nature of the
7 charges?

8 DEFENDANT DAY: Yes.

9 THE COURT: Has he explained how the sentencing process
10 works in general?

11 DEFENDANT DAY: Yes.

12 THE COURT: Have you given him all the facts that
13 you're aware of that he would need to know to figure out what is
14 in your best interest?

15 DEFENDANT DAY: Yes.

16 THE COURT: Continuing with you for a moment, Mr. Day,
17 there is no plea agreement that I'm aware of. But I want to
18 make sure you tell me whether anyone has made you any promises
19 or representations, guarantees or other statements about what
20 will happen to you at the time of sentencing.

21 DEFENDANT DAY: No.

22 THE COURT: Has anyone made any threats to you or to
23 any member of your family that prompts you to plead guilty this
24 afternoon?

25 DEFENDANT DAY: No, sir.

1 THE COURT: Has anyone made you any promises of
2 leniency?

3 DEFENDANT DAY: No, sir.

4 THE COURT: No one has told you what specific sentence
5 the court will impose; is that correct?

6 DEFENDANT DAY: That's correct, sir.

7 THE COURT: Are you presently on parole?

8 DEFENDANT DAY: No. I'm on supervised release, sir.

9 THE COURT: From an earlier federal offense?

10 DEFENDANT DAY: Yes, sir.

11 THE COURT: Are you aware of the consequences for
12 pleading guilty today in terms of what happens on that other
13 previous federal case?

14 DEFENDANT DAY: I'm aware of the consequences, yes.

15 THE COURT: Mr. Bell, do you feel that you understand
16 everything that's taking place here this afternoon?

17 DEFENDANT BELL: Yes.

18 THE COURT: Do you know of any reason why I shouldn't
19 accept your guilty plea?

20 DEFENDANT BELL: No.

21 THE COURT: Do you understand then that all that's left
22 in your case if I do accept the plea is for sentence to be
23 imposed?

24 DEFENDANT BELL: Yes.

25 THE COURT: And is your decision to plead guilty this

1 afternoon to Counts 2 and 3 entirely free and voluntary?

2 DEFENDANT BELL: Yes.

3 THE COURT: Mr. Day, I'm going to ask you the same
4 questions. Do you think you understand everything that's been
5 going on here today?

6 DEFENDANT DAY: Yes.

7 THE COURT: Do you know of any reason why I shouldn't
8 accept your guilty plea?

9 DEFENDANT DAY: No.

10 THE COURT: Then do you understand that all that will
11 be left in this case is for sentence to be imposed?

12 DEFENDANT DAY: Yes.

13 THE COURT: Is it still your desire to plead guilty
14 notwithstanding everything that I have tried to explain to you?

15 DEFENDANT DAY: Yes.

16 THE COURT: Mr. Newman, there are a few questions I
17 would like to address to you. Through your representation of
18 Mr. Bell, has he been able to cooperate with you in a competent
19 fashion?

20 MR. NEWMAN: Yes, Your Honor.

21 THE COURT: Did you sign the plea agreement in his
22 presence?

23 MR. NEWMAN: I did, Your Honor.

24 THE COURT: Did you discuss it with him before he and
25 you signed it?

1 MR. NEWMAN: Yes, Your Honor.

2 THE COURT: Does this plea agreement that Mr. Bell
3 entered into represent the entire disposition of his case?

4 MR. NEWMAN: It does, Your Honor.

5 THE COURT: Did anyone make any promises,
6 representations or guarantees to you that prompted you to
7 recommend that Mr. Bell plead guilty?

8 MR. NEWMAN: No, Your Honor.

9 THE COURT: Are you satisfied that his constitutional
10 rights have been observed?

11 MR. NEWMAN: I am, Your Honor.

12 THE COURT: Is Mr. Bell pleading guilty because of any
13 illegally obtained evidence in the government's possession that
14 you're aware of?

15 MR. NEWMAN: No, Your Honor.

16 THE COURT: Based upon your analysis of the law and of
17 the facts, is it your conclusion that it's in Mr. Bell's
18 interest for him to plead guilty today?

19 MR. NEWMAN: It is, Your Honor.

20 THE COURT: Same questions to Mr. Mayock. I know
21 there's no plea agreement, but throughout your representation of
22 Mr. Day, has he been able to cooperate with you in a competent
23 way?

24 MR. MAYOCK: He has, Your Honor.

25 THE COURT: Have you discussed the facts of this case

1 in detail with him?

2 MR. MAYOCK: I have.

3 THE COURT: Are you satisfied that he has no
4 meritorious defenses?

5 MR. MAYOCK: I am, Your Honor.

6 THE COURT: Is he pleading guilty because of any
7 illegally obtained evidence in the possession of the government
8 that you're aware of?

9 MR. MAYOCK: No, Your Honor.

10 THE COURT: Do you think after your analysis of the law
11 and the facts that it's in his best interests to plead guilty?

12 MR. MAYOCK: Yes, I do.

13 THE COURT: Mr. Brown.

14 MR. BROWN: Yes. Your Honor, I would like to state the
15 obvious consequence of pleading guilty in this case as regards
16 supervised release that constitute a violation of their
17 supervised release.

18 THE COURT: That applies only I think to Mr. Day.
19 Parole is the same basic consequence as to Bell.

20 MR. BROWN: Thank you, Your Honor. I'd also like to
21 point out that restitution is mandatory in this case. To my
22 knowledge, currently all the currency from the bank was
23 recovered so I don't believe it will apply. But in case I'm
24 incorrect on that or there was some other loss at the bank, I
25 did want the defendants to know they could be required to pay

1 restitution.

2 THE COURT: You anticipated something I was going to
3 ask you about when I got to you. Your turn will come in just a
4 minute.

5 MR. BROWN: I apologize, Your Honor.

6 THE COURT: That's all right. Mr. Mayock, do you know
7 of any reason why I shouldn't accept Mr. Day's guilty plea?

8 MR. MAYOCK: No, Your Honor.

9 THE COURT: Mr. Brown, as to the plea agreement between
10 the government and Mr. Bell, other than what is expressly set
11 forth in that plea agreement, has the government made any other
12 promises or representations, guarantees to him or his counsel?

13 MR. BROWN: No, Your Honor.

14 THE COURT: Has the government obtained a written
15 statement from either defendant?

16 MR. BROWN: No, Your Honor.

17 THE COURT: Other than what was seized at the time of
18 the arrest, has the government obtained any other evidence
19 directly from the defendants?

20 MR. BROWN: No, Your Honor.

21 THE COURT: Can you think of any reason why I shouldn't
22 accept the guilty pleas?

23 MR. BROWN: No, Your Honor.

24 THE COURT: That's true for both Mr. Bell and Mr. Day?

25 MR. BROWN: Yes.

1 THE COURT: Is there any additional inquiry you want me
2 to touch on, Mr. Brown?

3 MR. BROWN: No, Your Honor.

4 THE COURT: How about you, Mr. Mayock?

5 MR. MAYOCK: No, Your Honor.

6 THE COURT: All right. I'm going to do certain things
7 and here's what they are. As to each of Mr. Bell and Mr. Day, I
8 find that there's a factual basis for the entry of each of the
9 guilty pleas, in the case of Mr. Bell to Counts 2 and 3;
10 Mr. Day, Counts 1, 2 and 3. I find that each of them is alert,
11 seem to be able, intelligent, responsive, good demeanor.

12 I think each of them knows what he's doing and why.
13 Each of them understands the consequences. There seems to be no
14 basis to believe for either of them that there is any extrinsic
15 factor such as threats or physical condition or mental condition
16 or use of prescriptive drugs or other drugs that might interfere
17 with their ability to make a free and voluntary decision.

18 I think they're making a free and voluntary decision.
19 I find there's been ~~no~~ promises made by anyone and no other
20 instances of inducements or coercion that place in question the
21 voluntariness of the decision that each of them is making this
22 afternoon.

23 For all those reasons I order that the guilty plea from
24 Mr. Bell be accepted and the guilty plea from Mr. Day be
25 accepted. We're going to accept the guilty pleas to each of the

1 respective counts. We're going to set a date for sentencing
2 and it won't be until September for a host of reasons.

3 What date do you recommend?

4 THE CLERK: The 13th.

5 THE COURT: September 13th which is a Monday. Is that
6 available?

7 MR. MAYOCK: It is, Your Honor.

8 THE COURT: Mr. Newman?

9 MR. NEWMAN: Yes, Your Honor.

10 THE COURT: Mr. Brown?

11 MR. BROWN: Yes, Your Honor.

12 THE COURT: September 13th, 4:00, this court. The
13 presentence report will be compiled by the probation office.
14 Subject to advice that each of you may get from your respective
15 lawyer, I order you to cooperate with the probation office and
16 to return here for sentencing. Whatever the terms were of bail
17 and confinement that were previously imposed, those will remain
18 in effect. I think the marshal representatives are here. I
19 will remand you to ~~the~~ custody of the marshals.

20 Thank you, counsel.

21 MR. MAYOCK: There is one thing Mr. Brown has to bring
22 to your attention at this time regarding the custodial
23 situation.

24 MR. BROWN: Well, Your Honor, it's actually not for
25 Your Honor. It's for the Metropolitan Detention Center. I need

1 to write them a letter, status can be renotified.

2 THE COURT: Mr. Brown --

3 MR. BROWN: There's an order between the two defendants
4 and the Metropolitan Detention Center. It's administrative,
5 Metropolitan Detention Center. But it is true I'm going to
6 rescind that request today.

7 THE COURT: Okay. You may and now you're confirming it
8 on the record.

9 MR. BROWN: I don't think it's actually an agreement,
10 Your Honor. It's a representation that I'm going to do that.

11 THE COURT: All right. Does that take care of that?

12 MR. MAYOCK: Yes, Your Honor.

13 THE COURT: Anything else, counsel?

14 MR. MAYOCK: No, Your Honor.

15 THE COURT: Thank you.

16 (PROCEEDINGS ADJOURNED)

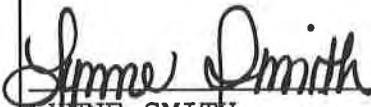
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C E R T I F I C A T E

19 I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT
20 TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-39.
DATED JANUARY 6, 2000; LOS ANGELES, CALIFORNIA.

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LYNNE SMITH
OFFICIAL COURT REPORTER

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EXHIBIT C

1
2 IN THE UNITED STATES DISTRICT COURT

3 CENTRAL DISTRICT OF CALIFORNIA

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5 - - -
6 THE HONORABLE A. HOWARD MATZ, JUDGE PRESIDING
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8 - - -
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10 UNITED STATES OF AMERICA,)
11 PLAINTIFF,)
12 -v-)
13 BRUCE BELL,)
14 DEFENDANT.)
15 -----

CASE NO. CR 99-123-AHM

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, OCTOBER 25, 1999

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET, #430
LOS ANGELES, CALIFORNIA 90012

APPEARANCES:

ON BEHALF OF PLAINTIFF:

ALEJANDRO MAYORKAS
UNITED STATES ATTORNEY
BY: ANDREW BROWN
ASSISTANT UNITED STATES ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

ON BEHALF OF DEFENDANT:

BRIAN NEWMAN
400 CORPORATE POINTE, #805
CULVER CITY, CALIFORNIA 90230

MONDAY, OCTOBER 25, 1999; LOS ANGELES, CALIFORNIA

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THE CLERK: CR 99-123-AHM, U.S.A. versus Montez Day and
Bruce Bell.

Appearances, counsel.

MR. BROWN: Good afternoon, Your Honor. Andrew Brown
for the government.

THE COURT: Good afternoon, Mr. Brown.

MR. NEWMAN: Good afternoon, Your Honor. Brian Newman
for Mr. Bell who is present in court.

MR. MAYOCK: Good afternoon, Your Honor. Michael
Mayock on behalf of Montez Day who likewise is present.

THE COURT: Good afternoon to all four of you.

All right. We're here for the pronouncement of
judgment and the sentence on both Mr. Day and Mr. Bell. I would
like to do Mr. Bell first.

MR. NEWMAN: Your Honor, on behalf of Mr. Bell, HE has
asked for a further continuance of today's sentencing. The
reason for the continuance -- and we would ask that a short
continuance of no more than a week -- is because of a flurry of
last-minute responses to my arguments by the probation office
which I didn't receive until late I believe Thursday, and also
had not gotten the psychiatric report until Tuesday, I think it
was Tuesday of last week, none of which Mr. Bell has had an
opportunity to even see.

1 So we were talking about he would like the opportunity
2 to see those reports and give me input considering the fact that
3 I think the structural issue that we're going to be addressing,
4 Your Honor, today is the core, whether Mr. Bell is actually a
5 career offender or not. These differences in sentencing between
6 whether he is or he isn't is very significant.

7 THE COURT: What does the psychiatric report then have
8 to do with whether he's a career offender?

9 MR. NEWMAN: Well, that doesn't. He has not seen that
10 report. And that is not the foundation for my request for a
11 week continuance.

12 THE COURT: All right. Well, that's what you said
13 though.

14 MR. NEWMAN: I'm sorry.

15 THE COURT: And I'm really not inclined to drag this
16 out any further.

17 Mr. Brown.

18 MR. BROWN: Your Honor, I just wanted to object to the
19 continuance. We had the change of plea on May 14th. It's been
20 five-and-a-half months. The late filings have been caused by
21 the defendant who filed his papers just days before the hearing
22 putting great strain on the government, the court and the
23 probation office in filing responses within 24 hours so that
24 people would have them.

25 And if he wanted to be sentenced second today to give

1 him a chance to go over the probation officer's responses, the
2 government wouldn't object to that. But the reply from the
3 probation office to his papers, they are minuscule changes.
4 They basically just reiterated their earlier position. So I
5 don't see that there's some big new thing that he needs to read
6 before the sentencing.

7 THE COURT: Okay. Well, I was just going to suggest
8 that you give your -- and I'll go first with Mr. Bell, with Mr.
9 Day. Sit down. You can do it at that table in the back so
10 you're not distracted. You can show him these very skimpy
11 items. They won't take long to review. You can explain them to
12 him. They don't address what you tell me is going to be the
13 principal focus of your argument anyway.

14 I have given both sides so many extensions and so many
15 opportunities to build their case and I have too many other
16 sentences on for next week to continue this again. So I'm going
17 to deny that request.

18 MR. NEWMAN: I understand, Your Honor. But for the
19 record, a lot of the continuance or extensions were because for
20 some reason the Bureau of Prisons moved Mr. Bell to Oklahoma, if
21 the court recalls, and it took a while to find him and to get
22 him back.

23 THE COURT: Let me make it clear to both you and Mr.
24 Bell, I'm not holding that against him in terms of your request
25 now. I'm simply reflecting that this has gone on for a long

1 time. You've both had an opportunity to meet with other each
2 and coordinate with each other. And I think you'll both have
3 the full opportunity to be heard. So I'll take Mr. Day first,
4 but that won't take all that long. So be efficient in showing
5 this material to your client.

6 MR. NEWMAN: I will, Your Honor.

7 THE COURT: Don't tell me you're going to seek a
8 continuance, Mr. Mayock.

9 MR. MAYOCK: Well, perhaps, Your Honor. There was a
10 little bit of a miss in the communications. Apparently
11 Mr. Brown had filed and FAXed a response to my position paper,
12 which admittedly I didn't file until Wednesday of last week as
13 your court stamp will indicate.

14 However, it will also indicate inside the attachment
15 that it was at that time that I was getting a copy from the
16 psychologist, a report, and I waited for that report. That was
17 the basis for the delay waiting for that.

18 But in any event, going back to the issue, I did not
19 receive a copy of the government's opposition. There was a FAX
20 number that I had about four or five years ago. And apparently
21 there was a FAX that was transmitted, that's happened in the
22 past.

23 Unless Mr. Brown has that document showing the FAX
24 number, it's a FAX of a firm that used to be on the same floor
25 where I was and I didn't get it in any event.

1 THE COURT: When did you get it?

2 MR. MAYOCK: I just was able to read his in court
3 today. And the problem that I have is this. Essentially my
4 client has advised me and I saw nothing to contradict this that
5 the early conviction, the first conviction was for powder
6 cocaine, not crack cocaine.

7 And secondly, there was an objection to unsworn
8 statements of the defendant. Now if there's going to be some
9 allegation that his father was not arrested and actually
10 convicted for murdering his mother, we can get court records if
11 that's what the prosecution seems to want. But I don't think
12 that that is essential. If that's the kind of record that
13 they're looking for, we can definitely obtain that if we had a
14 very brief continuance.

15 MR. BROWN: Two points, Your Honor. As far as the
16 crack cocaine versus powder cocaine, that was an inference that
17 I made from the quantity of the cocaine. I remembered reading
18 it, but I went over the presentence report just before sitting
19 down and I don't see it. So for all I know, it may well be
20 powder cocaine and I'm willing to so stipulate for purposes of
21 the sentencing.

22 And as to the second point, Your Honor, the government
23 isn't contending that it didn't happen. The government is
24 merely saying that they haven't carried their burden.

25 THE COURT: Okay. Well, there's no need for a

1 continuance in terms of what your concerns are, Mr. Mayock. I
2 have not assumed that it was crack cocaine and the difference
3 between whether it was crack or other cocaine is not going to be
4 at all a factor in my, and hasn't been as I prepared for this
5 sentencing.

6 In terms of the government's position relating to your
7 client's childhood history, I have construed it the way
8 Mr. Brown just described. I have assumed for purposes of my
9 analysis that what apparently happened did happen, what you say
10 happened happened. And that is to say that as horrific as it
11 is, your client as a very young boy may have actually seen, but
12 in any event, directly experienced the slaying of his mother by
13 his father.

14 I think that there are other reasons why it's highly
15 unlikely I would consider that as a basis for departure. It may
16 be a basis and I think there may well be other bases to not
17 impose the sentence at the high end of the guidelines as the
18 probation recommended, at least as to your client. But what you
19 think I might be inclined to misunderstand or not apply won't be
20 a factor at all. So I want to go ahead with today's proceeding.

21 MR. MAYOCK: Fine, Your Honor. If that's the case,
22 we're ready to proceed.

23 THE COURT: Okay. Then let's do so.

24 Now did you show to Mr. Day the government's very brief
25 response?

1 MR. MAYOCK: No, I didn't. I just read it in court.

2 THE COURT: Well, I want you --

3 MR. MAYOCK: I have discussed some of the factors with
4 him.

5 THE COURT: Mr. Day, do you feel that based upon what
6 Mr. Mayock summarized to you after he this afternoon for the
7 first time read the government's opposition to your position
8 about sentencing, do you feel that you understand what the
9 government's position is?

10 DEFENDANT DAY: Yes. Yes, Your Honor.

11 THE COURT: Okay. Then I don't think it's necessary
12 even to take a short break for Mr. Day to read that. And it's
13 pretty straightforward anyway. So we're going to proceed now
14 and let me start by saying this. Obviously both sides have read
15 the presentence report. So have I.

16 On Mr. Day's behalf, Mr. Mayock has made a number of
17 points and I'm going to recite those and then give you an
18 opportunity, Mr. Mayock, to supplement those by giving you a
19 focus and that focus will be my response to it. The way to do
20 this most efficiently and Mr. Newman, I want you to listen to
21 what I'm saying because this is going to be applicable to your
22 client as well.

23 After careful review of the way that the presentence
24 report and the recommendation characterize the guideline range,
25 I believe that there is a more precise way of stating it. And

1 this is the way it should be stated and this is the way I
2 believe the range is as presented by the probation office.

3 Your client, Mr. Mayock, has pled guilty to all three
4 counts. Mr. Bell pleaded only to Counts 2 and 3. As to
5 Mr. Day, the guideline sentencing range really is between 188
6 and 235 months. Well, at least as to Mr. Bell it is. Let's
7 take his to begin with. That's on Count 2. Plus an additional
8 84 months consecutive for Count 3. That means that the
9 guideline range is 272 months at the downward end, at the low
10 end, and 319 months at the high end.

11 For your client, Mr. Mayock, who is dealing with a
12 guilty plea to all three counts, it comes out much the same, but
13 the calculation is a little bit different. There is 60 months
14 on Count 1 -- excuse me. There is a range on Count 2 of just
15 what it is for Mr. Bell, between 188 months and 235 months.
16 There is a range, not a range, but a consecutive sentence
17 mandated on Count 3 of 84 months. Those two counts wind up
18 being at the range of 272 months to 319 months and that's the
19 range that I have calculated for purposes of figuring out what
20 is the fair sentence for your client as well.

21 As to the first count, for Mr. Day I would like to ask
22 our representative from the probation office whether that
23 changes the range given that there's a third count.

24 THE PROBATION OFFICER: It does not change the
25 guideline range; however, the sentencing mandatory maximum is 60

1 months. And then on that particular count your cap is 60
2 months.

3 THE COURT: Okay. So the range will be the same,
4 Mr. Mayock.

5 MR. MAYOCK: Yes.

6 THE COURT: Now getting back then to the positions that
7 you have asserted, Mr. Mayock, you believe that the criminal
8 history is overstated. And essentially as I construe and
9 understand your argument, it's because your client after appeal
10 was sentenced to a 16-month sentence, had already served 27
11 months before the weapon component of the conviction was
12 reversed and really was being sentenced for mere possession, not
13 mere possession for sale. But the offense occurred when he was
14 young and that to consider it to be a basis for career offender
15 status is unfair and distorts what is in fact the true situation
16 in terms of the prior criminal history.

17 Secondly, you have made an eloquent argument for a
18 departure based on what you classify as post-traumatic stress
19 syndrome and that gets us to the unique situation of the
20 father's apparent slaying of the mother. And coupled with that,
21 you point to a different classification arising out of the I
22 think the same concept and the same facts and that's that he
23 suffered extraordinary abuse as a child.

24 As to the criminal history factor, I think that I'm
25 inclined to accept Mr. Brown's response to that. I think that

1 the circumstances of the offense and the nature of the drug that
2 was being possessed unquestionably make it appropriate to serve
3 as the basis for career offender status. I do want you to
4 address that in light of what the government has said.

5 As to the request for departure, what most, what I find
6 to be most noteworthy is that Dr. Maloney's report itself and he
7 had two reports and I read them both, every word of both of
8 them. He said that it couldn't be argued that these awful
9 events caused Mr. Day to engage in, quote, "the illegal and
10 problematical behavior." He said -- and this is also a quote --
11 "He certainly does not present with any significant symptoms of
12 a major mental disturbance."

13 I went and looked at not only the provisions you've
14 cited, but 5(k)(2.13) which is the guideline provision relating
15 to diminished capacity. And then that speaks in terms of a
16 significant impairment, significantly impaired ability to
17 understand the wrongfulness of the behavior or to control the
18 behavior that the defendant knows is wrongful. And neither
19 component of what would be significantly reduced capacity has
20 been established by Dr. Maloney's report.

21 So although I think there are considerations that
22 militate in favor of not sentencing Mr. Day to the 319 months
23 that the probation office recommended -- and I'll give you a
24 chance to be heard about that too, Mr. Brown -- and although I
25 acknowledge that under the Brown decision where the Ninth

1 Circuit clarified a misunderstanding that Judge Tevrizian had, I
2 would have the discretion, if I thought it was warranted, to
3 make a departure, I decline to do so tentatively.

4 I'll listen to both of you, you and your client. For
5 the reasons that I have indicated, I don't think a departure is
6 warranted under the evidence before me. It is presumptively
7 discouraged. Disadvantaged upbringing and psychological trauma
8 such as this are not presumptively the basis. I think that the
9 guideline range as I have defined it and refined it is the range
10 within which the sentence should be imposed.

11 So that's my attempt, Mr. Mayock, to give you guidance.
12 You need to know, Mr. Day, that you have a right to speak to me.
13 I have been addressing your lawyer in kind of technical terms and
14 that's inevitable because that's what the guidelines require a
15 judge to do. It's just the way they're structured. But I do
16 want to hear from you. And with that I'll give the lawyers a
17 chance to be heard now.

18 Go ahead, Mr. Mayock.

19 MR. MAYOCK: Thank you, Your Honor.

20 The first point that I would want to make, and I will
21 focus these points on the departure, there are admittedly
22 categories that have been set forth in the sentencing
23 guidelines, particularly the 5(h)(1) sequence. The prosecution
24 has said that family ties is not ordinarily a basis for
25 departure and that under 5(h)(1.2) lack of guidance and a

1 disadvantaged upbringing is not relevant. They cite those and
2 they also cite a lack of guidance case coming from another
3 circuit involving a decision from the Second Circuit about --

4 THE COURT: A very recent decision.

5 MR. MAYOCK: Yes, but it's not from this circuit
6 either. But it's a stepfather killing, being killed. It
7 doesn't saying anything about whether it was in the presence of
8 the defendant in that case who was apparently eight at the time.
9 Also it was not a mother. Particularly important and
10 instructive would be the fact that you have a mother who is
11 murdered by her husband.

12 These are the parents of Mr. Day when he's
13 approximately six years old. And as Dr. Maloney reports, that
14 is a very crucial and important time in any child's life as far
15 as what impact that is going to have on them. So I would say
16 that even though Revera seems to talk about something that might
17 be significant, it's not relevant.

18 We pointed out in our position paper Section 5(h)(1.3)
19 as mental and emotional condition. And I analogize that to
20 departures that had been made under the post-traumatic stress
21 syndrome ground. And essentially as the court has recognized,
22 that is under diminished capacity. Diminished capacity, as the
23 court I'm sure is recognizing in looking at it, does not deal
24 specifically or allow departures where you have a violent act
25 taking place. But we're not asking in this case for any

1 departure based on that basis.

2 Rather, what we're asking for and it's specifically
3 mentioned is a downward departure because of extraordinary abuse
4 suffered by the defendant as a child. I would suggest that does
5 not come within the compass of family ties. It does not come
6 within the compass of lack of guidance either which the
7 prosecutor cites. Instead we're talking about uncharted
8 waters. I would talk about this in this way.

9 The Kuhn decision was decided in 1998 as this court is
10 well aware. In Kuhn they said virtually any appropriate
11 information relevant to a defendant's background, character or
12 conduct could be presented to the court as a basis for a
13 downward departure and the court's discretion was virtually
14 unlimited. If those bases were presented in an unusual way, the
15 court can depart downward.

16 My suggestion is that extraordinary abuse suffered as a
17 child doesn't directly fall under mental or emotional condition,
18 although that may be the closest. It doesn't fall under lack of
19 guidance and it doesn't fall under family ties.

20 Instead I think we have to take a look at those
21 sections, these 5(h) sections, and see when they were enacted.
22 Those were enacted in 1991. If you look at Kuhn, that's a 1998
23 U.S. Supreme Court decision. Clearly the U.S. Supreme Court
24 could recognize those and in essence gave authorization for a
25 court to create and have a departure where something doesn't fit

1 neatly within the box. And clearly in this case we don't
2 believe the box includes Mr. Day within the family ties or lack
3 of guidance 5(h)(1) groupings.

4 Again I would point out, as the court is well aware,
5 that the Ninth Circuit in the Brown case did consider severe
6 childhood abuse and neglect and a psychologist's report about
7 that childhood trauma as a basis for a downward departure. And
8 again, forgetting about Brown for a moment but a more recent
9 case, in United States versus Sanchez Rodriguez, the court
10 authorized, an en banc decision, authorized a departure for a
11 career offender along the base offense level where the predicate
12 offense was a very small amount of drugs. So I'm trying to come
13 around back to this point.

14 I think if we look at this entire situation based on
15 what has happened to my client in his life, you see here's a
16 person who, and I won't reiterate all the points that were made
17 in the paper, who has had a very traumatic, a very difficult
18 life, a life that no one would ever wish upon anyone else, any
19 other human being.

20 And he falls within a scope that is not clearly covered
21 by any of the guidelines and that's why Kuhn would apply. And
22 that's why under these circumstances too the court could look
23 under the authority of Sanchez Rodriguez for a downward
24 departure.

25 Specifically we've pointed out in looking at this kind

1 of case the four building blocks of mental health, the first one
2 being heredity. And here we've got an individual whose father
3 was diagnosed as a paranoid schizophrenic. And I've been
4 advised by his uncle, Arthur Day, that in the last couple of
5 months he's attempted to commit suicide. This is the heredity
6 that Mr. Day has.

7 The second building block is early nurturance. He
8 didn't get that. His mother was murdered. He was shifted from
9 place to place. And then his father came back when he was
10 probably about nine or ten years old and then raised him based
11 on voices that he heard directing him where to go and put him in
12 incredibly difficult situations in gang infested areas, poor
13 schools.

14 He's had numerous problems with early nurturance which
15 he did not receive. His traumatic experiences are just
16 overwhelming, start again with the murder and being reared by a
17 paranoid schizophrenic father, clearly that's a traumatic life
18 experience. And last, the quality of support system. He
19 doesn't have that. "It's clear he has nothing. He has on all
20 four building blocks of mental health, he has fallen far, far
21 short.

22 On TV the other night there was a program involving
23 Mike Wallace. Mike Wallace talked about having depression and
24 what effect it had on him. But you look at him and you look at
25 other people like Tipper Gore who have had admitted problems

1 with chronic depression and you look at what they have as far as
2 the quality of their support systems. And early nurturance and
3 a lack of traumatic experiences -- I can't say anything about
4 heredity -- but on those bases they're very different.

5 Even though they have mental problems, they don't have
6 the problems with the whole, all four building blocks basically
7 being shattered and falling down. That's why Mr. Day is very
8 much different than other people who might come in and might
9 make this sort of claim. On that basis I would respectfully
10 submit to the court that there is a basis for a downward
11 departure because of that and because of these circumstances
12 which are particularly unusual.

13 Turning to the overstated criminal history. I think
14 Your Honor hit the nail on the head. You said there were
15 problems that he had in getting an extra 11 months after the
16 case came back. He entered a guilty plea. Rather than remain
17 in custody and go through another trial after serving 27 months,
18 he did enter a plea.

19 Clearly the circumstances of that for an immediate
20 release would be a justification for someone to think that the
21 criminal history was over represented, particularly because he
22 had those extra 11 months. He'd already served above and beyond
23 the maximum that he could possibly get if he were convicted of a
24 charge.

25 At the time he was an 18-year-old youth. It was a

1 possession only case of powder cocaine which was for personal
2 use. On that basis I suggest respectfully that the court
3 reconsider the criminal history as being over represented,
4 particularly when you think of the circumstances under which
5 someone at 18 would have the opportunity to go on with his life
6 and the easiest thing to do would be to enter that plea and get
7 released from jail instead of continuing on on the presumptive
8 detention that, as the court is well aware, occurs in drug
9 cases.

10 THE COURT: Are you basically saying that I should
11 consider your client not have to been factually guilty, that he
12 didn't commit the crime that he wound up pleading to because he
13 pled given the circumstances you've now described?

14 MR. MAYOCK: Well, I'm saying that under the
15 circumstances rather than go forward with the trial, the case
16 was reversed and tainted parts were thrown out.

17 THE COURT: Right.

18 MR. MAYOCK: That was a clear motivating factor as
19 to -- and I'm not saying he didn't enter a plea. He's never
20 denied that he entered a plea. But when you look behind the
21 motive for entering that plea, to be released, particularly when
22 you've got a young man who committed this offense at age 18.
23 He's definitely not going to be as thoughtful as someone with
24 more life experiences, particularly more beneficial life
25 experiences than Mr. Day has had in his life, that that's a

1 basis for saying over representation or overstating the criminal
2 history occurred. And if that's the case, I have suggested in
3 our papers that the court consider looking at this as a
4 non-criminal history, a non- --

5 THE COURT: Non-career offender.

6 MR. MAYOCK: -- non-career offender case and look at
7 the offense level and consider what the offense level would have
8 been just considering all these factors, and we came up with a
9 calculation if the court did that it would be a guideline
10 range -- and this is a criminal history offense level of 27 that
11 was calculated by the probation officer -- would come out to be,
12 if the court made his criminal history category 4 instead of 5,
13 because it was just on the border of 5, 100 to 125 months plus
14 84 months which would give a sentencing range of 184 to 209
15 months.

16 Clearly that's a very, very substantial sentence.
17 We're not talking about anything that's inconsequential in any
18 way. That's an awful lot of time and it's a time that would
19 give my client the opportunity, we hope as Dr. Maloney hopes, to
20 receive the kind of counseling that he didn't receive early in
21 life and which he clearly needs and which Dr. Maloney who is a
22 clinical psychologist at the USC Medical School recognizes and I
23 would ask that the court impose that sort of a sentence.

24 THE COURT: Okay. Now a couple of questions. In terms
25 of counseling, I can make a recommendation and it will either

1 become available or not regardless of which alternative proposal
2 I adopt, right?

3 MR. MAYOCK: That's true, Your Honor. The Bureau of
4 Prisons has its own authority to do what it wants often.

5 THE COURT: And I hope he does get the benefit of
6 counseling if he needs it and I'll say so when I pronounce the
7 judgment.

8 Secondly, why don't you address what has been very
9 troubling to me which is the circumstances of the flight. Your
10 client was the driver. We could be sitting here, but for the
11 grace of God, with dead victims out there given that incredibly
12 reckless conduct that he displayed in trying to get away from
13 arrest.

14 I know what your arguments are and you've made them
15 very, very eloquently and that's not just trying to pat you on
16 the back. You've really done a good job. But you haven't said
17 anything about that and any judge sitting up here is going to be
18 greatly troubled, at least I'm greatly troubled by that.

19 MR. MAYOCK: I thought that the court might be asking a
20 question like that. I directed that specific question to my
21 client earlier to ask him what happened. And that's one of the
22 reasons why the post-traumatic stress analogy and argument was
23 made. What happens to somebody who has mental problems of this
24 kind and has experienced this kind of life is they just react.
25 They don't sit and contemplate. They in a stressful situation

1 find that they are acting in ways that a normal person wouldn't
2 act. That's what that entire stress syndrome is all about is
3 that kind of behavior.

4 What he did was he did drive, although there were a
5 couple of parts of the report that are inaccurate. Initially he
6 did not drive the van away, the vehicle away from the bank.
7 They got in a second vehicle and he was driving that vehicle.
8 That vehicle ended up being chased. There were --

9 THE COURT: Don't go into what happened during the
10 chase because it's just going to upset me all over again. I
11 know how dangerous it was.

12 MR. MAYOCK: The police were following. I think there
13 was a helicopter or two as well. He pulled into a mall and just
14 stopped where the police came up. He was the only one who
15 remained in the car. He didn't try to run at that point.

16 He has expressed to me that the concern he had was that
17 he was going to be shot and he felt that if he went to a mall,
18 that by being there where there were a lot of people, he
19 wouldn't get shot by the police.

20 I'm not saying this is clear thinking because clearly
21 it's not. But it is stressful thinking and it's the kind of
22 thinking that a person who has had the kind of upbringing that
23 my client has maybe engages in. That's the explanation he's
24 given me about why he stopped there and why he just sat in the
25 car and didn't make any effort to take his hands off the

1 steering wheel. He just brought the car to a stop and made no
2 further effort to run away.

3 THE COURT: I would like to hear from Mr. Brown before
4 I give Mr. Day a chance to speak with me. That way you can at
5 least have in mind whatever it is the prosecution is going to
6 say, Mr. Day.

7 MR. Brown.

8 MR. BROWN: Thank you, Your Honor.

9 First, I have a different explanation for arriving at
10 the mall and that's when you're being chased by a helicopter,
11 you don't really have a lot of options to evade the police on
12 the ground. Really the only way you're going to be able to get
13 away from them is if you can be someplace where a helicopter
14 can't see you such as inside an enclosed building.

15 There really isn't a better way to flee in hot pursuit
16 than if you can blend in with the crowd. And the fact that he
17 did not continue to flee after he stopped the car, I attribute
18 to the fact that the police were right on him and he didn't have
19 an opportunity and ~~that~~ his co-conspirator who was not driving
20 and was therefore able to leave the car more quickly only got a
21 few feet before being captured by the police.

22 THE COURT: Mr. Brown, what I would find most
23 productive in terms of your response is the issue of whether he
24 he's a career offender and how to deal with that first
25 conviction for the cocaine.

1 MR. BROWN: Okay. Well, Your Honor, he pled guilty to
2 possession of cocaine with the intent to distribute which is
3 clearly a predicate felony under the guidelines. And the
4 offense was actually a very serious one. There were three
5 separate firearms found in the house in which he was hiding.

6 THE COURT: But in the end, he wasn't convicted of
7 anything related to those firearms; is that correct?

8 MR. BROWN: No. His conviction for possession of a
9 firearm during the drug trafficking crime was reversed on
10 appeal. But it's not necessary that he be convicted of a
11 firearms offense in order for the conviction to count as a
12 predicate felony.

13 And here it's the defendant's burden to prove that his
14 criminal history is overstated. And all the defendant has said
15 is well, he may have had a reason to plead to an offense that he
16 didn't in fact commit. The defendant certainly hasn't said
17 that. There's certainly no evidence. This is merely a lawyer's
18 speculation as to what happened.

19 All we know for a fact is that he pled guilty to a drug
20 trafficking offense. Not only that, but there were very serious
21 circumstances surrounding it, including the shooting of a police
22 officer. So I don't think that there's any way to get around,
23 even if Your Honor was inclined to go there, the defendant
24 certainly has not carried his burden. There's nothing that
25 indicates that the count of conviction is an accurate one.

1 Moreover, I think that the history of the defendant
2 shows that a departure on criminal history access would be
3 inappropriate because of the danger he poses to the community,
4 which I think is the most serious factor warranting a sentence
5 at the high end. The defendant has numerous involvements with
6 firearms. In Paragraphs 59, 66, 73 and 84 there's all the
7 defendant involved with firearms.

8 Let's just take one of those, for instance Paragraph
9 84, where he was not actually charged with this. He was
10 arrested for being a felon in possession of a firearm in January
11 of 1994. Your Honor, that was just months before he then got
12 convicted of armed bank robbery where he had a pistol that the
13 teller saw tucked into his belt. And now, Your Honor, he gets
14 out of prison in mid-1998 and then in the beginning of 1999 he's
15 again arrested for armed bank robbery. This time two
16 defendants, two firearms. I think with his history of
17 involvement in firearms, the court should decline any departure
18 in the court's discretion because he's simply a danger to the
19 community.

20 Whether he's going to kill somebody for recklessly
21 fleeing from a crime or whether he's going to kill somebody with
22 the firearms that he uses time and again is immaterial. The
23 fact of the matter is, he's an extremely dangerous man. He's
24 had two opportunities to turn his life around in prison and each
25 time all he's done is get involved in ever-escalating crimes in

1 terms of their seriousness.

2 THE COURT: Just for the sake of analytical precision,
3 do you construe Mr. Mayock's arguments relating to the career
4 offender status as a request for a departure?

5 MR. BROWN: That is how I understood it, Your Honor.

6 THE COURT: Okay. I understood it slightly differently
7 as a request for a correction in terms of the calculation.
8 Which did you intend it to be, Mr. Mayock?

9 MR. MAYOCK: As a departure. That's why I was citing
10 the Sanchez Rodriguez case.

11 THE COURT: Okay. Anything further, Mr. Brown?

12 MR. BROWN: No, Your Honor.

13 THE COURT: Okay. Thank you.

14 Mr. Day, would you like to say anything to me? You
15 have a right to do it and sometimes it's very helpful to a
16 judge. So feel free to do it if you choose.

17 THE DEFENDANT: Your Honor, I'm not going to try to
18 make excuses for what I've done wrong. I admit to what I did
19 wrong in this case and in the last bank robbery.

20 I pled guilty to unarmed bank robbery which I did
21 commit. And I went to trial and the jury found me guilty of not
22 having a gun because -- not because they just didn't believe,
23 because they believed me, but they found me not guilty of not
24 having a gun because I didn't have one and because the people
25 had doubt.

1 They wasn't sure where I brought my bag from. They
2 couldn't say. They said I had a bag with blue and brown writing
3 on the bag and they said the gun was blue and brown. When they
4 asked where was that, where did I get it, they didn't even know.
5 Well, we don't know, he just had it in his hand; one minute he
6 did, one minute he didn't.

7 But I didn't have a gun. That's what I pled guilty
8 immediately. When my lawyer told me, I said I'll plead guilty
9 to the robbery. I did it. I was desperate and in the act of
10 impulse I went into Wells Fargo. I banked at Wells Fargo. I
11 had about \$12 in my account. My wife was -- my fiancée was
12 pregnant. The rent was due. I walked into there and I said
13 give me the money. I did that. That was just stupidity and it
14 was done -- it was just stupidity.

15 The first criminal case that I have, the possession
16 with intent to distribute powder cocaine, I was visiting a
17 friend's house. I was in the back room where there was no guns
18 with a lady. There was no drugs found in that room. The guy
19 who shot the police was in a totally different room with the gun
20 that belonged to his girlfriend. Okay?

21 The cocaine that they found was found in a can inside
22 of a bathroom. There was no evidence in the whole trial against
23 me being a drug dealer of any sort in there. There was nobody
24 said that I sold drugs. It was they were saying that the guy
25 that lived there sold the drugs.

1 I was visiting, the girl that was with me was visiting
2 that house. And the Appeals Court overturned the case because
3 of the lack of evidence in the trial, not just because of the
4 judge's ruling in the argument, but because of a lack of
5 evidence also. And I pled guilty because they told me I was
6 going to go home. When they said you plead guilty you go home
7 tomorrow. I mean, I've already been in prison two years, over
8 two years. I pled guilty. I didn't know that this would do
9 this to me later.

10 This case right here, this was stupidity. I mean, this
11 was just -- I don't know why. I don't know where the impulse,
12 why I just allowed myself to do something this stupid. Running
13 from the police, I was scared. The police was pulling guns out
14 on us. Every time we turned a corner they were coming out their
15 cars pointing guns. We were ducking. I didn't want to get
16 shot.

17 There was no guns in the car when the police finally
18 caught up to us. And I ran because I did not want to get shot.
19 I did not want them to shoot us because I know they're coming
20 because of the armed bank robbery. I don't want them to shoot
21 me. I'm trying to get away. I don't want no guns in the car.

22 I don't want to get killed. I don't want to get
23 killed. I pulled into the parking lot because I know there's a
24 lot of cars there, there's a lot of people there. I'm hoping
25 they're not going to open fire. I didn't jump out of the car

1 because I don't want to get killed.

2 THE COURT: A couple of people got hit by the car,
3 didn't they?

4 THE DEFENDANT: I had an accident in the intersection.
5 A light turned red on me and I was going so fast I slid on the
6 brakes. I couldn't stop and I wish I could apologize to the
7 person.

8 THE COURT: You hit one car and that car hit a second
9 car, right?

10 THE DEFENDANT: Yes. I hit the back of a burgundy,
11 dark burgundy mini van. I remember it clear as day. And that
12 car slid and hit the front of another car that was turning
13 right, making a right-hand corner. I mean I stopped for a
14 second and all I could think about was the police was going to
15 shoot me. So I proceeded on.

16 I didn't get out -- I wasn't trying to run from them as
17 far as -- I knew I couldn't get away from no helicopter. I know
18 once the helicopter's on you, you're going to jail. But I
19 didn't want them to shoot me and I kept driving around looking
20 for somewhere where it was populated that I could go to to keep
21 them from killing me. That's all I could think of. I didn't
22 want them to shoot me and kill me.

23 I mean, I can't ask -- I'm not asking, Your Honor, I'm
24 not asking you give me leniency because I didn't do anything
25 wrong or because I don't deserve to be punished. I agree. I

1 accept the fact that I deserve to be punished. I pled guilty
2 with no plea agreement, not because I was going to get a
3 benefit. I didn't get a benefit from the plea. I pled guilty
4 because I know I was guilty. There was no benefit offered to
5 me. No deal. There was no deal. I pled guilty because I know
6 I was guilty. I know I was caught dead bang doing what I was
7 doing.

8 As far as my childhood, Your Honor, that's something
9 that I don't normally discuss. I don't normally even tell
10 people. I have friends that's known me for years that don't
11 know my father killed my mother. And they don't know because
12 that's something that I don't talk about and I don't think is
13 any of their business.

14 I didn't tell none -- I never told anybody about it
15 until -- I didn't tell -- my fiancée told my lawyer the last
16 time I had a case when my lawyer talked about the issue. I just
17 didn't want to push the issue because it's something that I have
18 been dealing with all my life. And I have never known how to
19 deal with it. It's not something that -- I mean, it's just
20 something I've never known how to deal with it.

21 I'm asking for leniency not because I want to go home.
22 Because I don't feel that I deserve that much time. Because I
23 didn't make -- the mistakes that I made, a lot of it was made
24 out of impulses. The robbery of the bank was pure impulse. I
25 was visiting a friend which bad company brings about problems, I

1 agree. And this robbery right here was a stupid mistake. But I
2 know maybe one day I'll have the opportunity, I don't know.

3 Maybe I could write a letter and apologize to the
4 people in the car. I would like to apologize to the people in
5 the bank because I know they were scared. Even the teller in
6 the bank, I told -- not the teller, but the security guard, he
7 had his hands up. I said put your hands down, man, I'm not
8 going to do anything to you, man. Because I had no intentions
9 of physically hurting anybody. I needed some money.

10 My father after the FBI went and talked to my father,
11 they got my father attempting suicide. My family had to move
12 him back out of town. And now I'm going through more. I've got
13 more pain from my personal life than I do about being in jail.

14 THE COURT: Well, I understand the impact of that and I
15 also understand as best as somebody who is a total stranger to
16 you can from a very different perspective why the trauma of your
17 childhood or at least the experience of your childhood is not
18 something you quickly or routinely talk about. I really hear
19 you on that.

20 Is there anything further that you think I need to
21 know?

22 THE DEFENDANT: I mean, I think you have more than
23 enough in front of you to take your judgment, Your Honor. I
24 would just like to apologize to those that I've hurt. I mean,
25 the people inside the bank and the people that I ran into their

1 cars and the person that was involved in it and the trauma that
2 I brought upon them.

3 As I started to say about post-traumatic stress
4 disorder, I realize the trauma that I put people in by the
5 things that I've done. And I just hope that it doesn't affect
6 them like it's affected me. And there's nothing else I have to
7 say, Your Honor. Thank you for your time.

8 THE COURT: All right. I find that the guideline range
9 is what I stated. The low end would be 272 and the high end
10 would be 319, taking into account the mandatory consecutive 84
11 months on Count 3. I am not going to depart of either of the
12 bases that Mr. Day or his lawyer ask for and here's why.

13 As to whether or not the prior criminal record
14 overstates the seriousness of Mr. Day's offenses or distorts his
15 criminal profile, I think that the real question at its core is
16 what kind of risk to society does the prior history suggest
17 should be a factor for classification and for purposes of
18 sentencing. And I don't think that Mr. Day's history can be
19 looked at only in terms of the possession with intent to
20 distribute offense and the current charge before me and the
21 prior bank robbery before that.

22 There is a pattern of criminal behavior. It's
23 reflected in the probation report only in part in the sections
24 that Mr. Brown pointed to. I think that the fact that he was 18
25 when the cocaine offense occurred is a factor that affects where

1 I come out on the guidelines. I find that the particular
2 details of this offense and the explanation that Mr. Day just
3 gave me for what happened during the attempted flight reflect a
4 couple of factors that actually incline me not to depart.

5 Mr. Day's own statements are understandable. Not
6 wanting to be shot is a basic and very survival instinct that we
7 all, almost all of us have. But the choice that he made to
8 attempt to protect himself was made at the expense of society
9 and I'm afraid that that would be the choice he would make in
10 comparable circumstances in the future until and unless he can
11 get either the counseling or the treatment or the self insight
12 that would enable him to balance his interests as he perceives
13 them, his fears as he feels them with the interest and the fears
14 and the needs and the rights of other people, particularly other
15 innocent people.

16 So while I would have the discretion to accept
17 Mr. Mayock's requested departure on the seriousness of the
18 offense and whether or not Mr. Day should be classified as a
19 career offender, I decline to do so.

20 With respect to the impact of what happened when
21 Mr. Day was five or six, it's astonishing that someone could be
22 as strong as you appear to be, Mr. Day. I don't want you to
23 think I'm holding that against you. But in fact, I admire that
24 you can stand before me and speak to me in a really unusually
25 articulate way. You can deal with something in public that

1 slices anybody to the bone and that you can be capable of
2 alternative behavior in light of that.

3 The information that Mr. Mayock attempted to get and
4 that in fact was provided by the doctor doesn't support the
5 factors that Mr. Mayock pointed to. He has done what a good
6 lawyer should try to do and that is develop a basis for a
7 departure that isn't focused on any particular ground but
8 combines all of them and would make the whole greater than the
9 sum of its parts.

10 I don't say that to demean your argument, Mr. Mayock.
11 But that's the way I think it comes over. And I'm trying to
12 look at the whole here. And the whole that I see is somebody
13 who had other alternatives, even -- what I understand from the
14 probation reports -- in terms of the Seventh Day Adventist
15 suffering that you were exposed to, the several years of
16 non-criminal, non-violent, non-suicidal behavior on the part of
17 your father, you had opportunities, that you didn't have the
18 opportunities that many other people in society have, that I may
19 have had is unfortunate, but it doesn't require or authorize a
20 judge to say I'm going to depart downward from these factors.

21 And for those reasons and even given the recognition
22 that I'm now reflecting that I could do it, I decline to do it.
23 But I'm not going to sentence you to the 319 months. I don't
24 think that that would be appropriate for a number of reasons.
25 And those reasons need to be expressed because the range of the

1 guidelines here is in excess of 24 months.

2 Unlike Mr. Bell, Mr. Day is a younger man. There's an
3 opportunity that if the message is correct and if it's
4 calibrated, if I came out with something that is appropriate and
5 you may not be ever in agreement with that either today,
6 tomorrow or ten years from now. But what I'm trying to do is
7 reflect the seriousness of your conduct to the potential for you
8 to do better.

9 To simply and routinely give you what I'm authorized to
10 because of what you did, which is incredibly serious and not
11 just an isolated event, I think would be a mistake. I think
12 that you need to be given a hope and I'm trying to give you the
13 basis to hope that there is some opportunity, particularly at
14 your relatively young age. You'll be in jail no matter whether
15 I bought and accepted every argument that Mr. Mayock made. The
16 term would be lengthy even at that classification.

17 I haven't accepted his argument. But I don't want you
18 to think that I'm putting you in the same boat as Mr. Bell or
19 that I would just take all of the significant and very
20 compelling circumstances and say this is a bad guy, I'll give
21 him the highest end of the range I'm authorized to consider.
22 That is what I'm not going to do. So that's the reason for the
23 sentence that I'm now about to impose and here is the sentence.

24 Pursuant to Section 5E1.2, Subsection A of the
25 guidelines -- Mr. Brown?

1 MR. BROWN: Yes, Your Honor. I apologize if I missed
2 this, but I don't believe Your Honor has inquired whether the
3 defendant and defense counsel reviewed and discussed the
4 presentence report as is required under Rule 32(c)(3)(A). I
5 also don't whether -- I don't believe Your Honor has adopted the
6 findings of the presentence report.

7 THE COURT: Well, I will get to the findings in a
8 minute. I have not adopted the findings in terms of the way the
9 range has been reflected. I don't understand exactly what the
10 basis is for a potential life sentence. Neither lawyer has
11 addressed that. I've looked into that and I'm aware of at least
12 one decision, a Ninth Circuit decision, that says in essence if
13 there is a mandatory minimum and no max, a life sentence can be
14 implied as the max.

15 But that's under 924 Subsection E, not under 924(c).
16 So I don't know what the basis is for considering that there was
17 a potential upward range of a life sentence here. For that
18 reason I'm not accepting their findings. But as reflected and
19 corrected, and I thought I did this adequately at the beginning,
20 I accept their findings and their calculations.

21 In terms of the review of the report, I thought we had
22 gone over that. Mr. Mayock and Mr. Day, you have had a chance
23 to review the presentence report; is that correct?

24 MR. MAYOCK: It is, Your Honor.

25 THE COURT: And you and at least the government's

1 response to your opposition, correct?

2 MR. MAYOCK: Yes, Your Honor.

3 THE COURT: Is there any basis that you can think of
4 procedurally why it is not timely for me to impose sentence?

5 MR. MAYOCK: No, Your Honor, no legal cause.

6 THE COURT: Okay. Pursuant to Section 5E1.2 of the
7 guidelines, all fines are waived because I find that Mr. Day
8 does not have the ability to pay a fine. It is ordered that the
9 defendant shall pay to the United States a special assessment of
10 \$300 which is due immediately to the clerk of the court.

11 Pursuant to the Sentencing Reform Act of 1984 it is the
12 judgment of the court that the defendant Mr. Montez Day is
13 hereby committed on Counts 1, 2 and 3 of the indictment to the
14 custody of the Bureau of Prisons to be imprisoned for a term of
15 288 months. That is 24 years. This term consists of -- I have
16 to break this down. A combined -- Mr. Brown?

17 MR. BROWN: No, Your Honor. I was just going to break
18 it down.

19 THE COURT: How were you going to break it down?

20 MR. BROWN: 60 months on Count 1 to be run concurrently
21 with 204 months on Count 2, followed by a mandatory consecutive
22 term of 84 months.

23 THE COURT: Yes. Well, that's what I had scoped out
24 and that's the basis for the calculation of 288.

25 Upon release from imprisonment, Mr. Day shall be placed

1 on supervised release for a term of five years. This term
2 consists of three years on Count 1 and five years on Counts 2
3 and 3, with all those terms to be served concurrently and under
4 these conditions and terms.

5 First, Mr. Day shall comply with the rules and
6 regulations of the U.S. Probation Office and General Order 318.
7 Second, he shall participate in outpatient substance abuse
8 treatment and submit to drug and alcohol testing as instructed
9 by the probation officer. Mr. Day shall abstain from using
10 illicit drugs, alcohol and abusing prescription medications
11 during the period of supervision. During the period of
12 community supervision the defendant shall pay a special
13 assessment in accordance with this judgment's orders pertaining
14 to such payment.

15 The defendant shall participate in a psychological
16 psychiatric counseling or treatment program as approved and
17 directed by the probation office. And the defendant shall not
18 obtain or possess any driver's license, social security number,
19 birth certificate, ~~pass~~ passport or any other form of identification
20 without the prior written approval of the probation officer.
21 And he shall not use for any purpose or in any manner any name
22 other than his true legal name.

23 Now you have a right to appeal this sentence, Mr. Day.
24 And if you do so, you need to do so within ten days from today.
25 Please speak to Mr. Mayock who will give you all of the

1 information you need on how to prosecute an appeal from the
2 sentence that I've now imposed. And if you are in doubt and
3 need to know this, if you cannot afford to have Mr. Mayock
4 represent you on appeal, he will continue to be appointed at no
5 cost to you.

6 Now there are no counts to dismiss; is that right,
7 Mr. Brown?

8 MR. BROWN: That's right, Your Honor.

9 THE COURT: Okay. Is there anything further that needs
10 to be addressed?

11 MR. MAYOCK: Yes, Your Honor. I believe you said that
12 with respect to the supervised release each of the terms were to
13 run concurrently. But I don't know if you said that with
14 respect to the 60-month, 204-month and 84-month sentence. Those
15 are consecutive or concurrent?

16 THE COURT: Well, the 84 months is consecutive.

17 MR. MAYOCK: The 60 then is a concurrent sentence; is
18 that correct? I just wanted to make sure because otherwise the
19 Bureau of Prisons will run every sentence, if there's no record,
20 it runs consecutively.

21 THE COURT: I'm not sure how to --

22 MR. BROWN: Count 1, the 60-month term, runs concurrent
23 with Count 2, the 204-month term.

24 THE COURT: And that's what my findings were.

25 MR. MAYOCK: And then the 84-month term for the 924(C)

1 is consecutive.

2 THE COURT: Right. All right. Thank you.

3 MR. MAYOCK: Thank you, Your Honor.

4 THE COURT: Now let's turn to Mr. Bell, please.

5 Okay. Mr. Bell and Mr. Newman, have you had a chance
6 to review what you needed to?

7 MR. NEWMAN: We have, Your Honor.

8 THE COURT: Can you think of any reason why I should
9 not impose the sentence?

10 MR. NEWMAN: No, Your Honor.

11 THE COURT: Okay. Did you understand -- did you listen
12 to and understand what I said concerning the way I believe that
13 the calculations need to be articulated?

14 MR. NEWMAN: Yes, Your Honor.

15 THE COURT: Okay. Now I would like to proceed much as
16 I did with Mr. Day and that is to give you, Mr. Newman, a chance
17 to understand what my take is on your arguments. Then you can
18 address those in your oral arguments. Your client will be given
19 an opportunity also.

20 You have seen, Mr. Newman, that to the extent you are
21 objecting to the references in the presentence report concerning
22 the uncharged bank robberies, those have been modified and
23 changed. And I want you to know I truly have not taken those
24 into account.

25 MR. NEWMAN: I understand.

1 THE COURT: I don't have basis to consider that your
2 client committed those robberies and I don't think that he
3 should be treated that way and I haven't treated him that way in
4 my provisional thinking. So I want you to be clear about that.

5 To the extent that much of your position is based upon
6 Mr. Bell's designation as a career offender, it is that he was
7 not serving a sentence within the 15-year period that is the
8 outer scope. I think that the government's assessment of what
9 really happened, and it may be the probation officer's
10 assessment is correct too, he began serving a sentence on August
11 6th, 1981. That was aggregated. It was 30-plus year sentence.

12 The fact that he has chosen not to return from the day
13 of release was built into the sentence. It was basically for
14 the unauthorized escape. And had he not escaped, he'd have been
15 in custody past the start date which is January 29th in 1984.

16 I believe that the calculation is correct. I believe
17 that the reasons for the calculation make sense in this
18 particular case. I am not inclined to adopt your contention
19 that he should not be classified as a career offender.

20 You have also moved for a downward departure because
21 your client didn't wield a semi-automatic weapon, but instead a
22 .38 caliber weapon. I have no difficulty whatsoever in
23 rejecting that basis for a departure. Just because there's no
24 basis for departing upward under 5K2.17 doesn't mean and doesn't
25 justify flipping that concept and granting your client a

1 downward departure.

2 As to the relatively recent issue concerning his mental
3 status and his capacity, I have looked at Dr. St. John's report
4 and the diagnosis is what I think I'm required to pay most
5 attention to. The diagnosis is that Mr. Bell had borderline
6 intellectual functioning.

7 But the report itself makes it clear that while
8 immature, your client was capable of distinguishing right from
9 wrong and I don't find any basis, none, in the evidence before
10 me to suggest that the classification or the diagnosis that your
11 expert has come up with of being borderline intellectual, being
12 in the borderline intellectual functioning status warrants any
13 special consideration given the nature of this conduct. So
14 those are my initial reactions to the contentions that you have
15 asserted in response to the presentence report.

16 So that this transcript can stand alone and the Court
17 of Appeals can have a basis to evaluate from where I'm coming
18 from and how I've approached this sentencing, let me reiterate
19 what I said earlier this afternoon as to the co-defendant
20 Mr. Day. I think that the correct way of assessing the
21 guidelines, and your client is being sentenced only on Counts 2
22 and 3, is that the range for Count 2 is 188 months to 235
23 months. Count 3 brings a mandatory consecutive period of 84
24 months. So correctly stated the range would really be 272
25 months to 319 months.

1 And in a moment I will listen very carefully to what
2 you say and anything that Mr. Bell may choose to say. I am
3 inclined to sentence him at the upward level of 319 months.
4 With that as guidance, feel free to address it.

5 MR. NEWMAN: Thank you, Your Honor. We'll start first
6 with the career offender issue and that is that the basis of the
7 probation department's calculation as to what transpired with
8 the court subsequent to his recapture from the 1975 bank robbery
9 is based on records from the Bureau of Prisons that were
10 received from Metropolitan Detention Center because the records
11 were so old that that's where the probation officer went.

12 My client insists that the fact that the cut-off date
13 that he was sentenced to ten years on the bank robbery and that
14 that sentence had been terminated and that the second sentence
15 of 25 years on the second bank robbery was started after the
16 date of the, the break-off date.

17 THE COURT: If you can be precise and give me months,
18 dates and years, I'll be able to follow you better.

19 MR. NEWMAN: Yes. The date of -- let me get my paper
20 here.

21 THE COURT: Maybe you should look at Paragraphs 88 and
22 89.

23 MR. NEWMAN: Yes, Your Honor. That's what I was just
24 trying to find.

25 Mr. Bell was sentenced and was received at Lompoc on

1 January 16th, 1976 concerning the 1975 bank robbery; that he
2 continued serving that sentence until he was released on I
3 believe March 13th, 1981. At that time Mr. Bell was released on
4 a day pass and was then classified as an escapee. And I should
5 note that this paragraph and the subsequent paragraph are all
6 taken from the Bureau of Prisons records and not from the
7 court's records.

8 THE COURT: Do you have conflicting information from
9 these?

10 MR. NEWMAN: No, I don't, Your Honor, because the
11 records are so old. And I think that's why the probation
12 department usually tries to use court records, but in this case
13 was unable to which in and of itself makes the accuracy of this
14 information somewhat, somewhat -- I don't want to say unreliable
15 is probably too harsh a word -- but let's put it questionable.

16 THE COURT: Okay. Keep going.

17 MR. NEWMAN: That Mr. Bell was arrested on April the
18 28th of 1981 for the second bank robbery. Now that bank robbery
19 I should note, Your Honor, is not an issue as to being a
20 predicate offense. And as to what Mr. Bell states, is that the
21 sentence that he received for that conviction on July 8th, 1981,
22 he received consecutive sentences from the first bank robbery to
23 which he had previously been sentenced to.

24 So that by the time we get to I think it's July of 1984
25 wherein we're within the 15 years for the predicate first

1 offense for a career offender, that sentence had already been
2 served and at that time he was serving the subsequent sentence
3 for the 1981 bank robbery. Therefore, the 1975 bank robbery
4 would not be a predicate offense for career offender status.

5 THE COURT: Well, if you'll look at Paragraph 87, it
6 says he was sentenced in Docket 81-000583, escaped -- five
7 years' imprisonment concurrent to Count 1 in a different docket.
8 I'm trying to figure out what that different docket was.

9 MR. NEWMAN: I would assume the different docket would
10 have been the 1975 bank robbery.

11 THE COURT: Yes, but that's not what -- it's a
12 different docket number. The docket number for the '75
13 robbery's in Paragraph 84. Then you get to Paragraph 87 and it
14 refers to a different docket number, 497. I don't understand
15 why they do it this way. It would be so much easier to say the
16 1975 Crocker robbery and the 1981 Great Western robbery. It
17 would be much easier -- I'm just saying this for the sake of
18 communicating. It is so hard for a court to be as conscientious
19 as we try to be.

20 Anyway, what's your point?

21 MR. NEWMAN: So the point is is if the 19, if he had
22 completed his sentence for the 1975 bank robbery prior to July
23 1984, that would have been outside the 15-year requirement for a
24 predicate offense and he would not be a career offender.

25 THE COURT: I think that's analytically sound. That's

1 correct. But what about the "if," what makes you say that he
2 did complete it?

3 MR. NEWMAN: Well, Your Honor, the records are, I
4 believe are questionable at best. They're confusing as written
5 here as Your Honor just noticed. And the numbers don't really,
6 I should say the case numbers, docket numbers do not jive and I
7 think that that's evidence of the fact that it was an old case
8 that the records are not readily available.

9 The Bureau of Prisons in maintaining their records, I'm
10 not sure how complete they are or whether they're summarized.
11 They don't generally have the first information. They do now,
12 but in those days it was different. And whether they just had
13 case summaries, that would make the efforts of the probation
14 officer who I believe is conscientious and well meaning, make it
15 inaccurate or tend to be inaccurate or unclear. And certainly
16 if it's unclear, then the benefit of the doubt should go to the
17 defendant.

18 THE COURT: Okay.

19 MR. NEWMAN: The second other matter that Your Honor
20 addressed with regard to why the court would not do sort of an
21 about face because no --

22 THE COURT: I just want to help you out because if you
23 look at Paragraph 95, that's what seems to describe the nature
24 of the sentence that was imposed on July 8th of '81. That
25 supports the government's contention that the sentence for

1 No. 75-1734 which is the Crocker Bank 1975 holdup, was part of
2 an aggregated sentence.

3 MR. NEWMAN: But this was all taken from MDC records
4 and not from court files or judgment commitment orders.

5 THE COURT: Okay. But if I were to find or required to
6 find that this evidence is reliable, what does that do to your
7 argument?

8 MR. NEWMAN: Well, certainly if the sentences are
9 merged or are combined, then it appears that he would be a
10 career offender.

11 THE COURT: Okay.

12 MR. NEWMAN: I mean, I've got to be honest.

13 The other issue that Your Honor addressed with regard
14 to a requested downward departure based on the fact that he was
15 not armed with an automatic weapon, there is some case law to
16 support the fact, and we did cite some in our papers, that some
17 courts have taken the discretion and downward departed because
18 of the lack of using an automatic weapon.

19 Those cases have said that in a -- if you look at the
20 types of cases that where people are armed, that the typical
21 armed robber is armed with an automatic weapon as opposed to a
22 revolver and, therefore, some courts have elected to, because of
23 the ability of course of an automatic weapon to facilitate more
24 damage.

25 THE COURT: This weapon was plenty lethal enough. I

1 really don't think you should press that argument because I find
2 it to be utterly unpersuasive.

3 MR. NEWMAN: I understand, Your Honor.

4 The next issue Your Honor did not address in the
5 summary that I did raise in my paper, two other issues, where
6 the probation officer has increased his sentence or his range.
7 One is concerning the escape and the probation officer increased
8 his level by two levels pursuant to 2(b)(3.1)(B)(3)(a) of that
9 being, you know, a danger to the public. I think as the court
10 noted in the previous sentence --

11 THE COURT: Wait a minute. Are you talking about
12 whether there was an increment for reckless endangerment?

13 MR. NEWMAN: Reckless endangerment, that's correct,
14 Your Honor.

15 THE COURT: I don't think you're correct. I think the
16 probation office did not tack on two points for that.

17 MR. NEWMAN: I'm looking at Paragraph 36, Your Honor,
18 Page 8. And it certainly indicates a two-level increase.

19 THE COURT: Yes, but that's for physical restraint.
20 That's for what happened inside the bank. That's not for what
21 happened on the attempted flight.

22 MR. NEWMAN: Well, my understanding was the -- let's
23 see. Well, the following Paragraph 38 referred to a two-level
24 for the physically restrained.

25 THE COURT: No. I think what you need to appreciate,

1 Mr. Newman, is that the probation officer's calculation, which I
2 think is correct, is that you add on two points for the
3 restraint of the tellers and the bank manager. That occurred
4 inside the premises of the bank. The probation officer was very
5 explicit in saying that as to what happened in the cars
6 afterward really is attributable to the co-defendant. And I
7 took that into account in assessing the co-defendant's
8 arguments. So Mr. Day, but not Mr. Bell, was assessed for
9 reckless endangerment after the flight.

10 MR. NEWMAN: Well, my interpretation of those
11 paragraphs, Your Honor, was in Paragraph 37 -- I'm sorry, 36,
12 37, 38 in that she increased Paragraph 36 two levels.

13 THE COURT: Look at 40 and look at the top of Page 9
14 and you'll see zero, a big zero. This enhancement has not been
15 applied to Bell. It can't be any clearer. On top of Page 9.

16 MR. NEWMAN: I see where it is, Your Honor. But I also
17 see where -- I'm adding the points here. That she increased by
18 eight levels.

19 THE COURT: Two for property being taken, two for
20 bodily injury out of the collision, two for physical restraint
21 in the bank, two for the loss. That's 8 plus 20 which is the
22 base offense level. That would get to the 28. That's your 28.
23 If there were no career offender status, their reduction, the
24 three points for acceptance of responsibility and you would get
25 to the 25 that you're advocating.

1 MR. NEWMAN: Well, then it was my understanding in
2 reading this, Your Honor, in that my interpretation was that she
3 had increased it for physical restraint of the manager in the
4 branch which we argued against and the reckless endangerment
5 which we believe that Mr. Bell should not be --

6 THE COURT: I think you are not correct on that point,
7 Mr. Newman. The reckless endangerment has not been applied to
8 this.

9 Is that correct, Mr. Brown?

10 MR. BROWN: It is, Your Honor.

11 THE COURT: Okay. So why don't you move on beyond
12 that.

13 MR. NEWMAN: Okay. Going with Dr. St. Martin's report,
14 Your Honor, yes, Mr. Bell was considered of low intellectual
15 function and being immature, if you want to talk about someone
16 being immature at 47 years old. But what we have here is
17 someone who has had extreme difficulty functioning and that for
18 a short period of time he was able to beat a long history of
19 drug abuse and that we can say that this offense was not
20 predicated by his drug abuse, but predicated on the need for his
21 loss of his job, that he had no income and that, as was stated
22 earlier, it was virtually a spontaneous decision to do this.

23 And that Mr. Bell as a disjunctive argument to the
24 downward departure for the psychological impact or immaturity of
25 Mr. Bell, we ask that the court in the alternative mitigate that

1 because of his mental state, his low intellect would mitigate
2 some of the aggravating factors in the sentence.

3 Mr. Bell has been very vocal in his claim that he never
4 threatened to kidnap the manager, that he did push her away from
5 the door. He did not pull her by the hair. That it was a
6 violent robbery. He's not minimizing what he's done. But if
7 Your Honor sentences him as the court indicated, he will be in
8 his late seventies or eighties by the time he is released.

9 We are asking for a sentence in the low to mid-range of
10 the guideline range. The sentence that Your Honor meted out to
11 the co-defendant, 24 years, even if you sentenced Mr. Bell to
12 that sentence would put him into the upper sixties or seventies
13 by the time he would be released, certainly over any age of the
14 ability to commit any further offenses.

15 Mr. Bell has shown that for a period of time he was
16 able to function lawfully in society until some, until he lost
17 his job and he lost his job through no fault of his own or even
18 the employer. But he was injured on the job and therefore was
19 unable to work. And Mr. Bell came in early and pled guilty to
20 this offense.

21 THE COURT: For which he has been given three downward
22 points.

23 MR. NEWMAN: I understand that, Your Honor. But what
24 we're asking for -- and we're not asking for an unsubstantial
25 sentence. That 188 months is roughly 22 years. Where the

1 range -- I should say to 235, it goes up to 25 years -- is more
2 than substantial to adequately protect society and also to act
3 as a deterrent and rehabilitation such as it is within the
4 Bureau of Prisons to date.

5 But it should be noted, Your Honor, that Mr. Bell has
6 succeeded at least in his prior prison sentence in deridding
7 himself of a substantial drug habit that he's had. If Your
8 Honor looks at his record, it goes back to when he was a
9 teenager in the 1960s. And unless the court has any other
10 questions....

11 THE COURT: I don't think I do, but thank you,
12 Mr. Newman.

13 Mr. Brown, I think you heard what I said before about
14 my inclination. Do you feel any compelling need to add to what
15 you've said in your papers?

16 MR. BROWN: No, Your Honor.

17 THE COURT: Okay. Thank you.

18 Mr. Bell, you have a right, as did Mr. Day, to speak to
19 me. Please feel free to tell me anything that you want me to
20 take into account.

21 THE DEFENDANT: I have nothing to say, Your Honor.

22 THE COURT: All right. I respectfully decline to
23 depart from the guidelines and I also decline to deviate from
24 the probation office recommendation. I am going to sentence
25 Mr. Bell to the high end of the guideline range. And for the

1 record, the reasons are that I think that at the age of 47 the
2 lessons of the past still have not been learned.

3 This is a man who has an extremely extensive criminal
4 record. This offense was extremely serious. The factors that
5 counsel have pointed to in an admirable effort to do the best he
6 can for his client are unpersuasive. The mental considerations
7 I already addressed.

8 I do find and Mr. Newman was professional enough to
9 acknowledge that if there's no clear basis to dispute or reject
10 the calculation as to what happened in the aggregated sentence,
11 then there is a basis to incorporate the prior '75 offense as a
12 predicate felony for purposes of career offender status. I
13 don't find that there's any basis to question what apparently is
14 in the records of the MDC.

15 I think that the circumstances of this offense, the
16 nature of the offense, the defendant's previous history,
17 especially his criminal history all warrant sentencing at the
18 upward end of the guidelines. So for those reasons here's the
19 sentence.

20 All fines are waived as it is found that the defendant
21 does not have the ability to pay a fine. It is ordered that the
22 defendant shall pay to the United States a special assessment of
23 \$200 which is due immediately to the clerk of the court.

24 Pursuant to the Sentencing Reform Act of 1984, it is
25 the judgment of the court that Bruce Bell is hereby committed on

1 Counts 2 and 3 of the indictment to the custody of the Bureau of
2 Prisons to be imprisoned for a term of 319 months. This term
3 consists of 235 months on Count 2 and 84 months on Count 3 which
4 shall be served consecutively to the term on Count 2.

5 Upon release from imprisonment, the defendant shall be
6 placed on supervised release for a term of five years. This
7 term consists of five years on Counts 2 and 3 with all such
8 terms of supervised release to be served concurrently and under
9 these terms and conditions.

10 First, the defendant shall comply with the rules and
11 regulations of the U.S. Probation Office and General Order 318.

12 Second, the defendant shall participate in outpatient
13 substance abuse treatment and submit to drug and alcohol testing
14 as instructed by the probation officer. The defendant shall
15 abstain from using illicit drugs, alcohol and abusing
16 prescription medications during the period of supervision.

17 Third, during the period of community supervision, the
18 defendant shall pay the special assessment in accordance with
19 this judgment's order pertaining to such payment.

20 Fourth, the defendant shall not obtain or possess any
21 driver's license, social security number, birth certificate,
22 passport or any other form of identification without the prior
23 written approval of the probation officer. Further, the
24 defendant shall not use for any purpose or any manner any name
25 other than his true legal name.

1 Mr. Bell, you may appeal the sentence. To do so you to
2 need to file a notice of appeal within ten days. Please speak
3 to Mr. Newman about that. He will be available to represent
4 you. If you cannot afford to have a lawyer for purposes of
5 appeal, he can be made available to serve as your attorney.

6 Is there a motion concerning Count 1?

7 MR. BROWN: Yes, Your Honor. The government moves to
8 dismiss Count 1.

9 THE COURT: Okay. That motion, in the interest of
10 justice will be granted.

11 Is there anything further, counsel?

12 MR. NEWMAN: No, Your Honor.

13 THE COURT: Mr. Brown?

14 MR. BROWN: Nothing, Your Honor.

15 THE COURT: All right. Thank you, counsel.

16 (PROCEEDINGS ADJOURNED)

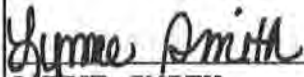
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C E R T I F I C A T E

19 I HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT
20 TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDINGS, PAGES 1-56.
DATED JANUARY 10, 2000; LOS ANGELES, CALIFORNIA.

21



22

LYNNE SMITH
OFFICIAL COURT REPORTER

23

24

25

CERTIFICATE OF SERVICE BY MAIL

I, TERESA GUZMAN, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on March 23, 2001, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: GOVERNMENT'S OPPOSITION TO DEFENDANT'S 28 U.S.C. § 2255 MOTION; DECLARATION OF MICHAEL MAYOCK; EXHIBITS

Addressed:	MICHAEL MAYOCK, ESQ.	MONTEZ DAY
	35 S. RAYMOND, SUITE 400	REG. NO. 12291-076
	PASADENA, CA 91105	U.S. PENITENTIARY, LOMPOC
		3901 KLEIN BOULEVARD
		LOMPOC, CA 93436

This Certificate is executed on March 23, 2001, in Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

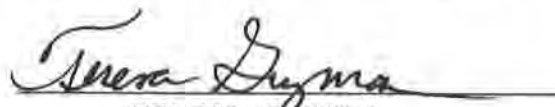

TERESA GUZMAN

EXHIBIT D

United States District Court
Central District of California

12291016

UNITED STATES OF AMERICA vs

Docket No. CR99-123-AHM

Defendant MONTEZ DAY

Social Security No. [REDACTED]-4812

Akas Derek Dayton, Derek James Dalton, Derek Daton,

[REDACTED]-3442, [REDACTED]-4912

Montez Days, Montey R. Day, Barry Black,Jackie Davis, Jackie James RimeMDC, Los Angeles, CA

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on this date

of: OCTOBER 25, 1999COUNSEL: X WITH COUNSEL Michael Mayock, apptdPLEA: X GUILTY, and the Court being satisfied that there is a factual basis for the plea.

OFFENSE: Conspiracy to commit bank robbery, in violation of 18 USC 371, as charged in Count 1; armed bank robbery, in violation of 18 USC 2113(a) (d), as charged in Count 2; use of a firearm during a crime of violence, in violation of 18 USC 924(c), as charged in Count 3 of the Indictment.

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court inquired of the defendant and his counsel as to whether there is any legal cause or reason as to the imposition of sentence. Due to the fact that there was not sufficient cause shown to the contrary by the defendant and/or his counsel, the Court ordered judgment as follows:

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived as it is found that the defendant does not have the ability to pay a fine.

IT IS ORDERED that the defendant shall pay to the United States a special assessment of \$300, which is due immediately to the Clerk of Court.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of a total of two hundred eighty-eight (288) months, which consists of sixty (60) months on Count 1, two hundred four (204) months on Count 2 and eighty-four (84) months on Count 3. The terms of imprisonment on Counts 2 and 3 to be served consecutively to each other and the term of imprisonment on Count 1 to be served concurrently with the terms on Counts 2 and 3 of the Indictment.

IT IS ADJUDGED, upon release from imprisonment, the defendant shall be placed on supervised release for a total term of five (5) years, which consists of three (3) years on Count 1 and five (5) years on each Count 2 and 3, all such terms to be served concurrently with each other, under the following terms and conditions:

1. That he shall comply with the rules and regulations of the U. S. Probation Office and General Order 318;

2. That he shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by the probation officer; and that he shall abstain from using illicit drugs, alcohol and abusing prescription medications during the period of supervision;

3. During the period of community supervision, he shall pay the special assessment in accordance with this judgment's orders pertaining to such payment;
 4. That he shall participate in a psychological/psychiatric counseling or treatment program, as approved and directed by the Probation Officer; and
 5. That he shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification without the prior written approval of the Probation Officer; further, that he shall not use, for any purpose or in any manner, any name other than his true legal name.
- Defendant informed of right to appeal.
The Court Recommends that the Bureau of Prisons provide psychiatric counseling to the defendant.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

Signed by:


A. HOWARD MATZ
U.S. District Judge

DATED/FILED:

10/28/99

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

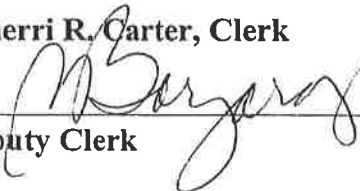
Sherri R. Carter, Clerk

Dated/Filed

10-28-99

Month / Day / Year

By


Deputy Clerk

DEFENDANT: MONTEZ DAY
CASE NUMBER: CR99-123-AHM

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The parties failed to establish support for the U.S.P.O.'s statement that the high end of the Guidelines would be a life sentence.

Guideline Range Determined by the Court:

Total Offense Level: 27 plus enhancement for career offender: 31

Criminal History Category: VI

Imprisonment Range: 272-319 months, including 18 USC 924(c)

Supervised Release Range: 3 to 5 years

Fine Range: \$ 15,000 to \$ 150,000

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: \$ 0

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reasons(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

Defendant is young enough to benefit from the experience of 24 years in prison, but his prior background—both as a criminal and as a victim of a childhood trauma (seeing his father slay his mother) justify less than the high end.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

EXHIBIT E

Montez Day Register # 12291-076
NAME
United States Penitentiary, Lompoc
3901 Klein Boulevard
Lompoc, California 93436
(ADDRESS or PLACE OF CONFINEMENT and PRISON NUMBER)
NOTE: If represented by an attorney, his name, address and telephone number

United States District Court
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	CASE NO.
v.	
MONTEZ DAY	(To be supplied by the Clerk of the U.S. District Court)
Full name of movant (include name under which you were convicted)	MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY
	28 U.S.C. §2255

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

INSTRUCTIONS AND INFORMATION — READ CAREFULLY

This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

Additional pages are not permitted. No citation or authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

MOTION UNDER 28 U.S.C. §2255

Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each judgment.

Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is: 312 N. Spring St., Los Angeles, Ca 90012

ATTN: Intake/Docket Section

Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack Central District of California
2. Date of judgment of conviction 5/14/99
3. Length of sentence 288 Months Sentencing Judge A. Howard Matz
4. Nature of offense or offenses for which you were convicted 18 U.S.C. § 371: Conspiracy to commit Bank Robbery; 18 U.S.C. § 2113 (a): Armed Bank Robbery; 18 U.S.C. § 924 (c) : use of Firearm during Crime of Violence
5. What was your plea? (Check one)
 - (a) Not guilty ()
 - (b) Guilty (X)
 - (c) Nolo Contendere ()

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details _____

6. Kind of trial: (Check one)
 - (a) Jury ()
 - (b) Judge only ()
7. Did you testify at the trial? Yes () No (X)
8. Did you appeal from the judgment of conviction? Yes () No (X)

9. If you did appeal, answer the following:
- (a) Name of Court _____
- (b) Result _____
- (c) Date of Result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment? Yes () No (X)
11. If your answer to 10 was "yes", give the following information:
- (a) (1) Name of Court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes () No ()
- (5) Result _____
- (6) Date of result _____
- (b) As to any second petition, application or motion give the same information:
- (1) Name of Court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes () No ()
- (5) Result _____
- (6) Date of result _____
- (c) As to any third petition, application or motion, give the same information:
- (1) Name of Court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes () No ()
- (5) Result _____
- (6) Date of result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

- | | |
|---------------------------|----------------|
| (1) First petition, etc. | Yes () No () |
| (2) Second petition, etc. | Yes () No () |
| (3) Third petition, etc. | Yes () No () |

(e) If you *did not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: SEE ATTACHED

Supporting FACTS (tell your story *briefly* without citing cases or law):

B. Ground two: SEE ATTACHED

Supporting FACTS (tell your story *briefly* without citing cases or law):

C. Ground three: SEE ATTACHED

Supporting FACTS (tell your story *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (tell your story *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? Yes () No (X)
15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
- (a) At preliminary hearing _____
 - (b) At arraignment and plea Michael Mayock, 35 South Raymond Avenue, Suite 400,
Pasadena, California 91105-1931
 - (c) At trial SAME AS ABOVE
 - (d) At sentencing SAME AS ABOVE
 - (e) On appeal _____
 - (f) In any post-conviction proceeding _____
 - (g) On appeal from any adverse ruling in a post-conviction proceeding _____
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at approximately the same time? Yes (X) No ()
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes () No (X)
- (a) If so, give name and location of court which imposed sentence to be served in the future: _____
 - (b) And give date and length of sentence to be served in the future: _____
 - (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed sentence to be served in the future? Yes () No ()

WHEREFORE, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.
Executed on 10-23-2000
(Date)

Montez Day
Signature of Movant

(Petitioner)

(Respondent[s])

**DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS**

I, MONTEZ DAY, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes X No _____
 - a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.
\$57.00 Monthly, U.S.P. Lompoc, 3901 Klein Blvd., Lompoc, Ca. 93436
 - b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received, within the past twelve months, any money from any of the following sources?
 - a. Business, profession or form of self-employment? Yes _____ No X
 - b. Rent payments, interest or dividends? Yes _____ No X
 - c. Pensions, annuities or life insurance payments? Yes _____ No X
 - d. Gifts or inheritances? Yes _____ No X
 - e. Any other sources? Yes _____ No X

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account? Yes X No _____ (Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.


\$12.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No X

If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. Tiyona M. McCladdie (daughter)
Haalin F. Taalib-Din (daughter)

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.
Executed on 10-23-2000
(Date)


Signature of Movant

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of \$_____ on account to his credit at the _____ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: _____

Authorized Officer of Institution

Title of Officer

28 U.S. CODE, SEC. 2255

§2255. Federal Custody: remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. As amended May 24, 1949, c. 139, § 114, 63 Stat. 105.

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL,
CONVICTION OBTAINED BY PLEA OF GUILTY WHICH WAS UNLAWFULLY INDUCED
NOT UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA.

Prior to plea, Defendant, MONTEZ DAY received a Pre-Plea Report from Attorney Michael Mayock, stating that the Defendant was facing a sentence of 60 months on Count 1, 300 months on Count 2 and 84 months to life on Count 3. This Pre-Plea Report was reviewed by Attorney Michael Mayock and Defendant, MONTEZ DAY.

When the Defendant questioned Attorney in regards to the Law and the Sentence recommended by the Pre-Plea Report, Defendant was told that he was facing what the Pre-Plea Report stated and that the Defendant could receive a Life sentence for Count 3.

When the Defendant, MONTEZ DAY talked to Attorney, Mayock about going to trial to prove his innocents as to Count 3, the Defendant was told that he would lose the trial and that the judge would more than likely give him more than 7 years, for Count 3, possibly Life, if he gets mad during trial.

When Defendant, MONTEZ DAY talked about going to trial, he was told that if he did he would lose. Defendant continued to maintain his desire to go to trial on Count 3, at one time Attorney, Mayock told the Defendant that if he went to trial that he would lose the 3 points for acceptance of responsibility on count 2, and that he did not want to make the Judge mad.

The Defendant was shown a Plea-Agreement, and was urged by the Attorney to sign. When the Defendant refused to sign the Plea-Agreement he was told by his Attorney that he should take the deal so that he could get less time, and that the judge would probably give him (the defendant) only 7 years on count 3.

1 Defendant, MONTEZ DAY asked his Attorney how could he receive a
2 Life sentence on Count 3, and stated that he did not believe that the
3 law allowed such a sentence in his case, but was told by Attorney
4 that he could get a Life sentence for Count 3.

5 During the Defendants Plea-hearing the Defendant was asked by the
6 Court if he (the defendant) understood the charges and when MONTEZ
7 DAY, the defendant was asked if he understood Count 3, he initially
8 stated No, after the Prosecutor gave a Legal definition of Count 3 the
9 defendant stated yes, even though he was still confused.

10 At that hearing the Defendant, MONTEZ DAY was urged to Plead to
11 all Counts, despite the fact that he was only guilty of Count 2 and
12 possibly Count 1, he did not want to Plead Guilty to Count 3 and
13 asked his Attorney for more time, but his Attorney, Michael Mayock
14 told him that he should Plead Guilty.

15 Criminal Procedure 18 §924(c)(1)(A)(ii) states if the firearm is
16 brandished, be sentenced to a term of imprisonment of not less than
17 7 years; and, Section (C) states "In the case of a second or subse-
18 quent conviction under this subsection, the person shall (i) be sen-
19 tence to a term of imprisonment of not less than 25 years; and (ii)
20 if the firearm involved is a machinegun or a destructive device, or
21 is equipped with a firearm silencer or firearm muffler, be sentence
22 to imprisonment for Life.

23 The Defendant, MONTEZ DAY was induced to Plead Guilty to a charge
24 that he is innocent of, from the time he reviewed the Pre-Plea report,
25 which was supplied by the Government and used by his Attorney, Michael
26 Mayock which stated that the defendant was facing a Life sentence.

27 Therefore defendants Attorney not only unlawfully induced the def-
28 endant to plead Guilty when he was innocent, but used a flawed report.

DEFENDANT'S CRIMINAL HISTORY AND OFFENSE LEVEL
ARE OVERREPRESENTED

Several circuits have held that a district court may depart downward from the career offender guideline. United States v. Shoupe, 35 F.3d 835 (3rd Cir. 1994) (departure from career offender can be in both criminal history and offense level); United States v. Lawrence, 916 F.2d 553 (9th Cir. 1990). The Ninth Circuit found it was proper to depart downward for a career offender based on the disproportionate treatment of drug offenders United States v. Reyes, 8 F.3d 1379 (9th Cir. 1993) and based on the nature of priors and the age of the defendant, United States v. Brown, 985 F.2d 478 (9th Cir. 1993).

According to the Probation Report, Defendant MONTEZ DAY at age 18 was arrested for and convicted of possession of 16 grams of cocaine. PSR. §66 other charges against Mr. DAY were reversed on appeal. This amount consistent with personal use. During the trial there was very little testimony or evidence against Mr. DAY, so little that the trial Judge gave Mr. DAY a downward depart, stating in words and action that MONTEZ DAY played a Minor if not a minimal role in the case. this was his reasons for giving MONTEZ DAY two point departure for his role, this statement by the court shows that his involvement in such a small amount of cocaine was Minor, This statement can be found in the original sentencing hearing.

Due to the youth of defendant MONTEZ DAY and the Minor role in the offense, coupled with the fact he served an additional 11 months more the sentence actually imposed, he should be granted a downward departure on the basis that his Criminal History is overrepresented.

United States v. Brown, 985 F.2d 478 (9th Cir. 1993)

1 held that the guidelines permit a court to depart downward even for
2 individuals designated as career offenders. The United States
3 Sentencing Guidelines allow a sentencing court to depart downward if
4 the applicable criminal history category "significantly overrepresents
5 the seriousness of a defendant's criminal history." USSG § 4A1.3
6 (Policy Statement). In United States v. Sanchez-Rodriguez, 161 F.3d
7 556 (9th Cir. 1998) (en banc) the Ninth Circuit authorized a departure
8 for a career offender along the base offense level axis where the
9 predicate prior was a very small amount of drugs. That is the case here
10 also the fact that the defendant played a Minor role in the prior
11 offense should be taken in consideration based on the Application Notes
12 of § 4B1.1.Career Offender (2) "Section 4B1.1 (Career Offender) express-
13 ly provides that the instant and prior offense must be crimes of viol-
14 ence or controlled substance offenses of which the defendant was con-
15 victed. Therefore, in determining whether an offense is a crime of
16 violence or controlled substance for the purpose of § 4B1.1(Career
17 Offender), the offense of conviction(i.e. the conduct of which the
18 defendant was convicted) is the focus of inquiry.

19 Therefore the Defendant, MONTEZ request that the court, resentence
20 him, by either granting this request for a Downward departure, or by
21 determining that the predicate prior dose not fit the purpose of
22 § 4B1.1 Career Offender based on the Application notes.

A DOWNWARD DEPARTURE IS WARRANTED BECAUSE OF
EXTRAORDINARY ABUSE SUFFERED BY DEFENDANT AS A CHILD

The United States Sentencing Guidelines permit a downward departure in the atypical case where a guideline or guidelines linguistically applies but the defendant's conduct falls outside the "heartland" of cases. USCG Ch. 1, Pt. A, Section 4(b). In this case, a number of factors separate MONTEZ DAY from the heartland of other cases and converge to establish an appropriate basis for a downward departure. As the United States Supreme Court has now unequivocally affirmed, in the exceptional or unusual case, a sentencing court may depart downward.

The Court's decision in Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 2045, 135 L.Ed.2d 392 (1966), establishes definitively that, where as here, atypical circumstances exist that are not specifically forbidden by the United States Sentencing Guide, a court has discretion to depart where a factor is present to an exceptional or unusual degree. At least two such factors exist in this case, neither of which is specifically forbidden by the Guidelines. The presence of these factors compel an "atypical" characterization of the circumstance of this case.

Section 3661 of Title 18 United States Code codifies the fundamental tenet, echoed in the Guidelines at Section 1B1.4 (Nov. 1995), that a sentencing court's ability to consider virtually any appropriate information relative to a defendant's background, character or conduct in determining whether to grant departure is virtually limitless. Section 3661 states in pertinent part:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

1 United States may receive and consider for the purpose of
2 imposing an appropriate sentence.

3 Similarly, the Supreme Court's decision in Koon instructs:

4 Whether a given factor is present to a degree not
5 adequately considered by the Commission, or whether a
6 discouraged factor nonetheless justifies departure
7 because it is present in some unusual or exceptional
8 way, are matters determined in large part by comparison
9 with the facts of other Guidelines cases. Id. at 2039.

10 The United States Sentencing Guidelines (USSG) section 5H1.3 (Policy
11 statement) provides in relevant part:

12 Mental and emotional conditions are not ordinarily relevant
13 in determining whether a sentence should be outside the
14 applicable guidelines range...

15 Discouraged factors are not ordinarily relevant but may be relied
16 upon as bases for departure in exceptional cases, such as where the
17 factor is present to an exceptional degree, or in a way that makes
18 the case different from an ordinary case where the factor is present.
19 While it is clear that the Commission at least considered family
20 circumstances, and that "ordinary" family circumstances are normally
21 discouraged factors for departure, the Ninth Circuit has recognized
22 that the presence of family circumstances to an unusual, special, or
23 extraordinary degree can serve to remove a case from the heartland.
24 United States v. Mondelo, 927 F.2d 1463, 13470 (9th Cir. 1991).

25 MONTEZ DAY is a young man who has from childhood faced exceptional
26 circumstances. At age 6 his father murdered his mother with a knife
27 in his presence. His father was convicted of murder and imprisoned.
28 He was diagnosed as a Chronic Schizophrenic. According to his uncle,
Arthur Day, who has a Master's Degree in Psychology, MONTEZ DAY
never taled about losing his mother or the murder. His aunt
Henrietta Day took MONTEZ to therapy for several years, after his

1 traumatic lost. MONTEZ was an angry child who did not play or spend
2 a lot of time with other children. His father, Jimmy Day, came
3 back about 4 years later and took MONTEZ to live with him. Jimmy
4 Day was upset that MONTEZ had been taken to therapy, even though he
5 him self was in therapy, and believed his thoughts and the voices he
6 was hearing could help him. Jimmy Day moved into bad areas where
7 there was a lot of gang activity and switched MONTEZ from school to
8 school. MONTEZ became very withdrawn and did not interact with
9 others. Arthur Day believes MONTEZ needs more therapy than he
10 received and that MONTEZ became cold although he looks calm and
11 restrained, since he is out of touch with his feelings.

12 Dr. Michael P. Maloney, Ph.D. conducted a psychological
13 evaluation of the defendant, MONTEZ DAY. Subsequently Dr. Maloney
14 prepared a report and a later supplement to it which are appended
15 hereto. In the personal history section of the report Dr. Maloney
16 reviews the murder of MONTEZ DAY's mother by his father and the
17 aggravation of the effect of this by an uncle being killed in a
18 stabbing a couple of years after his mother's death. Dr. Maloney at
19 page 6 of his report states "there is also a strong suggestion that
20 he was the victim of on-going physical abuse during his early teens.
21 There is also a certain amount of instability in that he moved from
22 one family home to another." After administering mental status
23 examinations, Dr. Maloney concludes "it would appear that he dose
24 not have these traits that are often associated with what is
25 sometimes referred to as a criminal personality". Dr. Maloney
26 Concludes "this man dose not present (sic) with any characteristics
27 of a significant mental disorder". Then Dr. Maloney qualifies this
28 respones by saying "at the same time however, his quite atypical

1 childhood experiences did contribute to his general problematic
2 behavior which started during his adolescence years. Not only was
3 this man exposed to severe and atypical circumstances (including
4 being present at or about the time of his mother's killing by his
5 father) but was also exposed to a primary parenting figure (father)
6 who had been incarcerated on more than one occasion. Mr. Day has
7 not ever had the opportunity of fully exploring the effect of these
8 early traumas on his psychological makeup. Whatever the disposition
9 in this case, it would seem quite important that he be provided an
10 opportunity to explore this. This may result in a decrease in
11 recidivistic criminal behavior."

12 The foregoing statement by Dr. Maloney encouraging counseling
13 for MONTEZ DAY because of his severe and atypical background actually
14 presents a case for a downward departure on the basis of post
15 traumatic stress syndrome. According to medical literature there is
16 a five-step process for competent psychiatric evaluation of an
17 individual. They are as follows:

- 18 1. Accurate medical and social history;
- 19 2. Historical data from the patient and independent sources;
- 20 3. Thorough physical examination;
- 21 4. Appropriate diagnostic studies; and
- 22 5. A mental sight evaluation (which alone is insufficient
23 for diagnosis).

24 Dr. Maloney's observations tend to indicate there is a problem
25 with Defendant MONTEZ DAY and this problem can be readily seen in
26 examining the four characteristics that mental health professionals
27 recognize as the building blocks of mental health. These are:
28 1) heredity, 2) early nurturance; 3) summation of traumatic

1 life experiences; and 4) quality of an individual's support system.

2 Defendant MONTEZ DAY falls outside the scope of each of the
3 building blocks for mental health. First, under the heredity prong,
4 his father is a know and diagnosed schizophrenic. Second, he
5 experienced little early nurturance because his mother was murdered
6 by his father and he was raised by his father under circumstances
7 which caused him to receive little guidance of counseling. Third,
8 MONTEZ DAY"s traumatic life experiences include the murder of his
9 mother by his father in his presence and the subsequent murder of a
10 close uncle also by stabbing. Fourthly, the quality of MONTZ DAY'S
11 support system is non-existent. He had no family or therapist on
12 whom he could rely to give him needed support or counseling to develop
13 adequate mental health. Instead, what appears is a symptomology
14 consistent with an individual who is a victim of post traumatic
15 stress syndrome.

16 The court also has discretion to depart downward in cases of
17 post traumatic stress syndrome. United States v. Cantu, 12 F.3d 1506,
18 1512 (9th Cir. 1993). In United States v. Risse, 83 F.3d 212, (8th
19 Cir. 1996) it was determined that the court properly departed downward
20 for diminished capacity based on a defendant's post traumatic stress
21 order resulting from service from the Vietnam War. According to
22 Dr. Dennis Charney, A yale psychiatrist, "victims of a devastating
23 trauma may never be the same biologically. It dose not matter if it
24 was the incessant terror of combat, torture, or repeated abuse in
25 childhood, or a one-time experience like being trapped in a hurricane
26 or nearly dying in an auto accident, all uncontrollable stress can
27 have the same biological impact. Emotional Intelligence,
28 Daniel Goldman at pages 203 and 204.

1 In this supplemental report, Dr. Maloney relates the information
2 he gleaned about MONTEZ DAY from his uncle, Arthur Day, who has a
3 master's degree in psychology and also works as a counselor. Arthur
4 Day reiterated for Dr. Maloney the abusive and frightful life of
5 MONTEZ DAY as a child. Dr. Maloney concludes, "It dose seem quite
6 clear that Montez Day suffered extreme psychological trauma at the
7 time of his mother's death." Dr. Maloney reports that at 6 or 7 years
8 of age MONTEZ DAY was at "an extremely vulnerable time" when he
9 witnessed his mother's death at his father's hands and that his father
10 was "a very problematic role model." Dr. Maloney concludes that the
11 extremely traumatic events during (Montez Day's) childhood years
12 contributed to his having serious difficulty in terms of being able
13 to maintain a well-adjusted, stable and law-abiding life." Again,
14 Dr. Maloney stresses the importance of MONTEZ DAY receiving counseling.

15 In United States v. Brown, 985 F.2d 478 (9th Cir. 1993) the court
16 was allowed to consider as a basis for a downward departure the severe
17 childhood abuse and neglect of a defendant where a psychologist's
18 report concluded that childhood trauma was the primary cause of
19 defendant's criminal behavior. In the instant case Dr. Maloney
20 concluded that it would be difficult to argue that MONTEZ DAY'S
21 traumatic childhood had "no impact" on his ability to abide by
22 the structures of society.

23 For the foregoing reasons, a downward departure for MONTEZ DAY'S
24 abusive and traumatic childhood experience is more than warranted.
25 The Defendant ask that the Court re-consider this Plea for a Down-
26 ward departure and re-sentence MONTEZ DAY to a substantial lower
27 sentence.

CONCLUSION

For the above reasons and facts the Defendant, MONTEZ DAY respectfully asks the court to reverse defendant Guilty Plea, to Count 3 and set a date for trail, so that the defendant can have a fare trail as our Constitution allows. The Defendant also request that the Court reverse his Sentence in regards to Count 2 and Determine for the purpose of Justice that the Defendants prior Offense dose not fit the purpose of § 4B1.1 Career Offender.

Lastly MONTEZ DAY, the defendant Pleas to the Court to grant a downward departure, for the Extraordinary Trauma suffered by the Defendant, MONTEZ as a child.

I declare under penalty that the foregoing is true and correct.
Executed on October 23, 2000

Respectfully submitted,

MONTEZ DAY
REGISTER # 12291-076
UNITED STATES PRISON, LOMPOC
3901 KLEIN BLVD.
LOMPOC, CALIFORNIA 93436

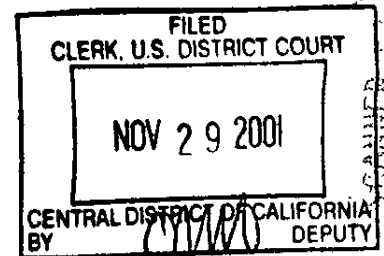
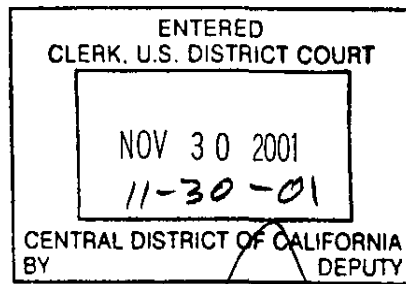
CERTIFICATE OF SERVICE

I, MONTEZ DAY hereby certify that I have served a true and correct copy of the following; Motion to Vacate, Set aside or correct Sentence by a Person in Federal Custody 28 U.S.C. § 2255.

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court and parties to litigation, by placing same in a sealed, postage prepaid envelope Addressed to; United States Court House, United States District Judge, 312 N. Spring Street, Los Angeles, California 90012, and deposited same in the United States Postal Mail at the United States Penitentiary, Lompoc, California, on this 24 day of October, 2000.

Montez Day
Register # 12291-076
United States Penitentiary
3901 Klein Blvd.
Lompoc, California 93436

EXHIBIT F



Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF
AMERICA,

Plaintiff,

v.

MONTEZ DAY,

Defendant.

CASE NO. CV 00-11896 AHM ✓
(No. CR 99-123 AHM)

ORDER DENYING SECTION 2255
PETITION

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Introduction

Defendant raised three separate grounds in his initial motion to vacate, set aside or correct his sentence. First, he contended that his attorney was ineffective in that he allegedly misadvised defendant as to the statutory maximum sentence available under Title 18, United States Code, Section 924(c), and pressured defendant into pleading guilty. Second, defendant contended that his status as a career offender overstated the seriousness of his prior criminal history. And third, defendant argued that he should have received a downward departure for the purportedly extraordinary abuse he suffered as a child.

In his reply to the Government's opposition, defendant appears to add the argument that his trial counsel was ineffective because he did not file a notice of

3

1 appeal. As will be shown, none of these contentions justifies the relief defendant
2 seeks.

3 1. Statutory Maximum Sentence

4 The Government is correct that the information that defendant's counsel
5 gave him about the statutory maximum for a violation of 18 U.S.C. § 924(c)
6 (Count 3) is, and was, life imprisonment. *United States v. Pounds*, 230 F.3d
7 1317, 1319 (11th Cir. 2000).

8 2. Criminal History Calculation

9 The gist of defendant's arguments were proffered before the sentence was
10 imposed. The Court was aware of these arguments and in calculating the proper
11 criminal history, the Court exercised its discretion appropriately.

12 3. Downward Departure Based on Childhood Abuse

13 The gist of defendant's arguments were proffered before the sentence was
14 imposed. The Court was aware of these arguments and in declining to adopt
15 them, the Court exercised its discretion appropriately.

16 4. Notice of Appeal

17 The transcript reflects that defendant himself was advised of his right of
18 appeal. (Ex. C., p. 94, to Government's Opposition.) Indeed, defendant
19 acknowledges that he himself "signed the paper" (evidently, a waiver of his right
20 to appeal). Reply Memo, page 5. Because this Court has addressed the merits of
21 defendant's second and third claims, and has not adopted the Government's
22 position that those claims are barred procedurally because no appeal was taken,
23 the alleged failure of trial counsel to file an appeal is moot and harmless.

24 Defendant's trial counsel is known to be one of the most experienced,
25 conscientious, diligent and effective criminal defense attorneys in this District.
26 His representation of defendant was consistent with that reputation. Even on a
27 prima facie basis defendant's contentions fail to meet the exacting standards of
28

1 *Strickland v. Washington*, 466 U.S. 668, 687-91, 694 (1984) for demonstrating
2 ineffective assistance of counsel. No hearing is warranted.

644445

3
4 IT IS SO ORDERED.

5
6 DATE: 11/29/2001

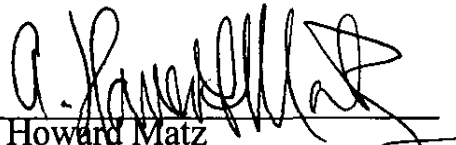
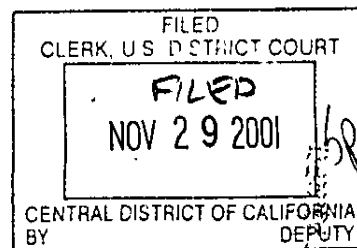
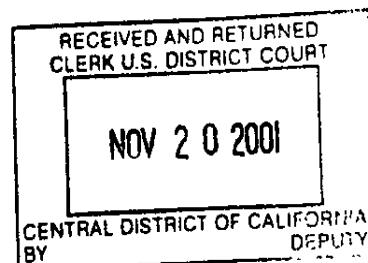
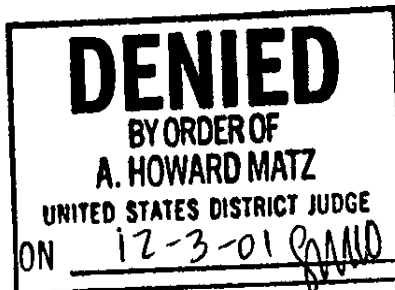
7 
A. Howard Matz
United States District Judge

EXHIBIT G

MONTEZ DAY
 Register # 12291-076
 United States Penitentiary, Lompoc
 3901 Klein Boulevard, J-unit
 Lompoc, California 93436



Priority
☒ Send
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 JS-5/JS-6
 JS-2/JS-3



UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

V.

MONTEZ DAY,

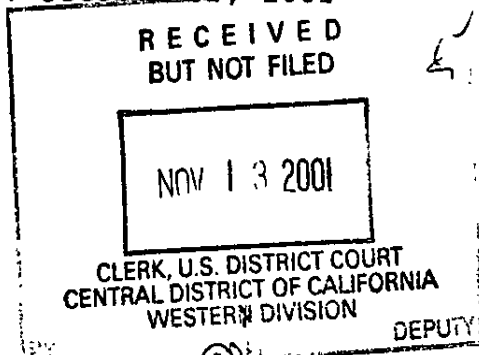
Defendant.

No. CV 00-11896-AHM ✓
 (No. Cr 99-123-AHM)

MOTION FOR LEAVE OF COURT
PURSUANT TO RULE 15 ()

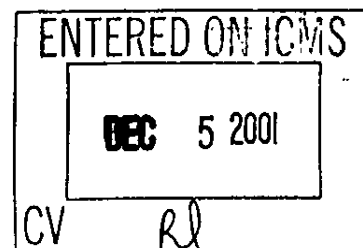
The Petitioner comes before this court Pro se, filing a Motion for leave of Court pursuant to Rule 15. For the purpose of filing a supplement on newly discovered evidence and a memorandum of points and authorities.

DATED: October 31, 2001



Respectfully submitted,

Montez Day

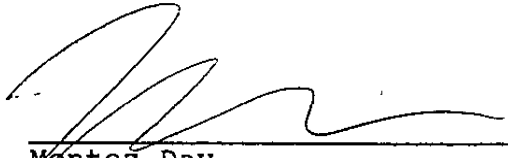


DEC 4 2001

CERTIFICATE OF SERVICE

I, MONTEZ DAY hereby certify that I have served a true and correct copy of the following; Motion for leave of Court.

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the Court and parties to litigation; by placing same in a sealed, postage prepaid envelope Addressed to; United States Court House, United States District Judge, 312 N. Spring Street, Los Angeles, California 90012, and deposited same in the United States Postal Mail at United States Penitentiary, Lompoc, California, on this 31 day of October, 2001.



Montez Day
Register # 12291-076
United States Penitentiary, Lompoc
3901 Klein Boulevard, J-Unit
Lompoc, California 93436

CERTIFICATE OF SERVICE BY MAIL

1 I, MONTEZ DAY hereby certify that I have served a true and
2 correct copy of the following; MOTION FOR LEAVE OF COURT
3 PURSUANT TO 28 U.S.C. §2255 MOTION, by placing same in a sealed
4 postage prepaid envelope addressed to; ANDREW BROWN, Assistant
5 United States Attorney, 312 North Spring Street, Los Angeles,
6 California 90012, in the United States Postal Mail at United
7 States Penitentiary, Lompoc on this 27, day of November, 2001.

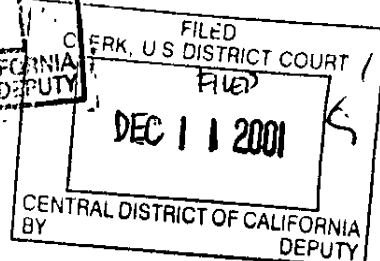
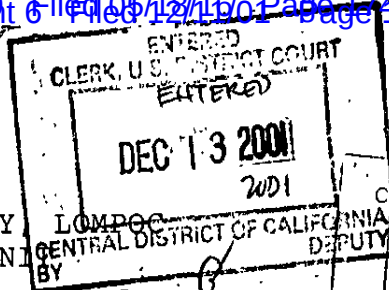
8 This Certificate is executed on November 27, 2001 and is
9 deemed filed at the time it was delivered to prison authorities
10 for forwarding to the COURT and above addressed parties for
11 litigation, by placing same in a sealed, postage prepaid
12 envelope addressed to; United States Court House, United States
13 District Judge, 312 North Spring Street, Los Angeles, California
14 90012, and deposited same in the United States Postal Mail at
15 United States Penitentiary, Lompoc, California, on this 27 day
16 of November, 2001.

17
18
19 
MONTEZ DAY

20 Register #12291-076
21 United States Penitentiary, Lompoc
22 3901 Klein Boulevard, J-Unit
23 Lompoc, California 93436-2706
24
25
26
27
28

EXHIBIT H

MONTEZ DAY
REGISTER #12291-076
UNITED STATES PENITENTIARY
3901 KLEIN BOULEVARD, J-UNIT
LOMPOC, CALIFORNIA 93436



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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MONTEZ DAY,

Petitioner,

No. CV 00-11896-AHM
(No. CR 99-123-AHM)

**MOTION FOR RECONSIDERATION
PURSUANT TO FEDERAL RULES OF
CIVIL PROCEDURE, RULE 60 (b)**

The Petitioner comes before this Court Pro se, and moves this Honorable Court for Relief from judgment/order of November 30, 2001, and request Reconsideration of 28 U.S.C. §2255 issues Pursuant to Federal Rules of Civil Procedure, Rule 60 (b).

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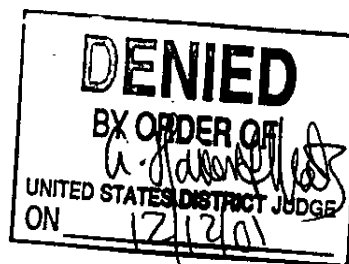
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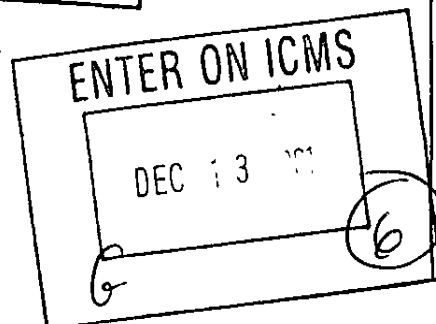
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THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).



☒ Docketed
☐ Mld copy Ptys
☒ Notice Ptys
☒ JS-6

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 FACTUAL BACKGROUND

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4
5 In 1999, Petitioner, MONTEZ DAY was indicted for robbing "HOME
6 SAVINGS OF AMERICA"... On May 14, 1999, Petitioner pled guilty to
7 all counts surrounding the alleged bank robbery and was sentence
8 to 24 years. On November 30, 2001 this Court denied Petitioner's
9 Section 2255 Motion.

10 Pending before this Court is Petitioner's MOTION FOR
11 RECONSIDERATION pursuant to Federal Rules of Civil Procedure 60
12 (b).

13 A motion for reconsideration under Federal Rules of Civil
14 Procedure 60 (b) must based on one of three grounds: 1) Intervening
15 change of controlling law; 2) New evidence not previously
16 available; or 3) A need to correct a clear error of law or to
17 prevent manifest injustice. See ATKINS v. MARATHON LETOURNEAN CO.,
18 130 F.R.D. 625, 626 (S.D.Miss. 1990)(citing NATURAL RESOURCES
19 DEFENSE COUNCIL v. UNITED STATES ENVTL. PROTECTION AGENCY, 705
20 F.Supp. 698, 702 (D.D.C.). The decision whether to grant or deny
21 the motion is entrusted to the sound discretion of the district
22 court. See RODGERS v. WATT, 722 F.2d 456, 460 (9th Cir. 1983)(en
23 banc).

24 The issue in this motion for reconsideration under 60 (b) is
25 appropriate based on "A need to correct a clear error of law
26 (and/or) to prevent manifest injustice, and Newly discovered evidence.

II

LEGAL ARGUMENTS

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Petitioner was convicted of three (3) counts surrounding a Robbery of "Home Savings Of America". The crime of Bank Robbery has as an essential element a proper showing of Federal Deposit Insurance Corporation insurance. See UNITED STATES vs. SCHULTZ, 17 F.3d 723 (5th Cir.1994) (stating proof of Federal Deposit Insurance Corporation insurance is not only an essential element of the crime, but it is also essential for the establishment of Federal Jurisdiction). See also 18 U.S.C. §2113(a) and (f) "(a) whoever, by force and violence, or by intimidation takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of any Bank, Credit Union, or any Savings and Loan Association;"

"(f) as used in this section the term "Bank" means any member Bank of the Federal Reserve System, and any Bank, Banking association, Trust company, Savings Bank, or other Banking institution organized or operating under the laws of the United States including a Branch or agency of a Foreign Bank (as such terms are defined in paragraphs (1) and (3) of section (b) of the International Banking Act of 1978), and any institution the deposit of which are insured by the Federal Deposit Insurance Corporation."

It could be inferred from the language of subsection (f) that the institution referred to in 18 U.S.C. §2113(a). That the requisite element to establish the crime of Bank Robbery would be

1 the institution be a member of the Federal Reserve System and
2 insured by Federal Deposit Insurance Corporation.

3 The instant case at hand is void of both these requirements
4 to support Petitioners conviction. It can be glean from the
5 attached Exhibits that the government has not and cannot prove the
6 jurisdictional element required to sustain this conviction.

7 Petitioner was indicted for crimes committed against a
8 non-operating institution with inactive or no insurance. See
9 Exhibit "A" which is a Federal Deposit Insurance Corporation
10 Confirmation and Report, showing that "Home Savings Of America",
11 became inactive as of October 03, 1998. This document shows that
12 Petitioner's conviction was obtained without jurisdiction and based
13 on a fatally defective indictment.

14 Petitioner's Indictment alleges that on or about January 26,
15 1999, Petitioner by force, violence, and intimidation, knowingly
16 took from "Home Savings Of America", 301 South Maclay Street, San
17 Fernando California, a Savings and Loan association the deposits
18 of which were then insured by Federal Deposit Insurance
19 Corporation.

20 In UNITED STATES vs. FITZGERALD, 882 F.2d 397,399(9th Cir.1989)
21 The court stated: according Fed. R. Crim. P.7, an indictment must
22 be a plain, concise, definite written statement of the essential
23 facts constituting offense charged. Fed. R. Crim. P.7(c)(1) "the
24 instrument must set forth the elements of the offense charged and
25 contain a statement of the facts and circumstances that will inform
26 the accused of the elements of the specific offense." UNITED STATES
27 vs. MARTIN, 783, F.2d 1449, 1452(9th Cir. 1986)

28 In the instant case the indictment alleges a crime that could

1 not possibly been committed. Petitioner was charged with robbing
2 a financial institution, which on the date of alleged, was closed
3 or inactive on that date. See Exhibit "A".

4 During Petitioner's Plea colloquy or change of plea hearing,
5 the government had Petitioner agree that the institution allegedly
6 robbed was a federally insured institution (FDIC). Exhibit "B",
7 which is a Declaration by a FDIC Attorney, dated February 21, 2001,
8 indicates that the Bank known as "Home Savings Of America" was
9 acquired by another bank "Washinton Mutual Bank" on October 03,
10 1998, months prior to the date of the alleged robbery.

11 This communication, stipulation or agreement is in valid under
12 the circumstances. First, it was done unitelligently, due to lack
13 of advise from counsel. Second, it violates Fed. R. Crim. P. Rule
14 11(f), which provides "notwithstanding the acceptance of a plea
15 of guilty, the court should not enter a judgment upon such plea
16 without making such inquiry as shall satisfy it that there is a
17 factual basis for the plea."

18 This requires finding sufficient evidence to conclude that the
19 conduct admitted by the defendant constitutes the offense charged.
20 UNITED STATES vs. BAKER, 618 F.2d 589, 592(9th Cir.1982) the
21 purpose of the rule is to protect a defendant who pleads with an
22 understanding of the charges, but "without realizing that his
23 conduct does not actually fall within the definition of the crime
24 charged" UNITED STATES vs. ANGELES-MASCOTES, 206 F.3d 529(5th
25 Cir.2000).

26 Under Fed. R. Crim. P.11, before a plea may be accepted, the
27 district court must "address the defendant personally in open court
28 and inform the defendant of, and determine that the defendant

1 understand ,... the nature of the charge to which the plea is
 2 offered..." Fed. R. Crim. P.11(c)(1) "omitting to tell the
 3 defendant of an essential element of the offense entails a complete
 4 failure to inform the defendant of the nature of the offense to
 5 which he pleads", in violation of Rule 11(c)(1). UNITED STATES vs.
 6 GREEN, 882 F.2d 999, 1005(5th Cir.1989) (citation omitted); see also
 7 UNITED STATES vs. SMITH, 184 F.3d 415, 417(5th Cir.
 8 1999) (reiterating rule). Likewise, the constitution also requires
 9 that "the Defendant receive []"real notice of the true nature of
 10 the charge against him, the first and most universally recognized
 11 requirement of due process," HENDERSON vs. MORGAN, 426 U.S. 637,
 12 645 (1976), quoting SMITH vs. O'GRADY, 312 U.S. 329. 334 (1941) A
 13 notice that requires a description of the essential elements of the
 14 plea offense, at least where the elements are "critical". see id.
 15 at 647 N.18.

16 In viewing the record neither the government nor the court ever
 17 informed Petitioner that the government was required to prove
 18 jurisdiction (FDIC) if the case were to go to trial, which clearly
 19 violates Fed. R. Crim. P. 11 see also UNITED STATES vs. SCHULTZ, 17
 20 F.3d 723 (5th Cir. 1994).

21 SWEETON vs. BROWN, 27 F.3d 1162, 1169(6th Cir. 1994) (citing
 22 UNITED STATES vs. SIVIGLA, 689, F.2d 832, 835(10th Cir.1981), cert.
 23 denied, 461 U.S. 918, 103 s.ct. 1902, 77 L.ed. 2d. 289(1983)
 24 stating "lack of jurisdiction cannot be waived and jurisdiction
 25 cannot be conferred upon a federal court by consent, inaction or
 26 stipulation... A court lacking jurisdiction cannot render judgment
 27 but must dismiss the cause at any stage of the proceedings in which
 28 it becomes apparent that jurisdiction is lacking."

1 There is nothing directly to support the inference of Federal
2 Deposit Insurance Corporation, insurance on the date of the alleged
3 offense. UNITED STATES vs. ALI, 2001 DJDAR 10641 (9th Cir. 2001)
4 "twenty years ago, the fifth circuit forcefully put the government
5 on notice that "[d]espite the fact that FDIC insurance status is
6 an express requirement of the applicable statutes, an essential part
7 of a valid indictment, and an indispensable item of proof of an
8 offense, prosecutors have been extremely lax in the treatment
9 accorded this element"... "Today we reiterate that sentiment. Proof
10 of Federal Insurance is not merely an element of the offenses for
11 which Ali was convicted: it is essential to establish federal
12 jurisdiction."

13 In the instant case the charging document is fatally flawed,
14 the allegations contained therein allege an offense that could
15 not possibly have occurred. The attached Exhibits clearly show and
16 state that after October 03, 1998, the institution known as "Home
17 Savings Of America" was not Federal Deposit Insurance Corporation,
18 insured, in fact it did not exist.

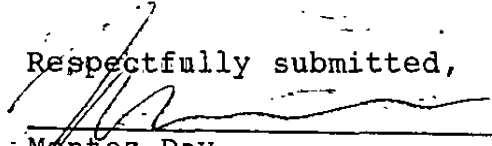
19 Petitioner's conviction is void.

20
21 CONCLUSION

22
23 Based on the foregoing reasons, Petitioner, Montez Day prays that
24 this Court, to correct a manifest injustice, vacate Petitioner's
25 sentence and order dismissal of Petitioner's indictment for lack
26 of jurisdiction as a matter of law.

27 Dated December 6, 2001

28 Respectfully submitted,


Montez Day

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EXHIBIT "A"

Home Savings of America, FSB

4900 Rivergrade Road

Irwindale, CA 91706

FDIC Certificate # 15919 Bank Charter Class: SA

Primary Federal Regulator: OTS

Primary Internet Web Address: Web site not available

Demographic Information As Of: February 6, 2001

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This is an inactive institution.

Inactive as of: October 3, 1998

Closing history: Merged without Assistance into

Acquiring institution: Washington Mutual Bank, FA - (32633)

Report Selection:

Assets and Liabilities - \$ Amount ☒

Report Date:

September 30, 1998 ☒

Generate Report

Last Updated: 2/16/2001

Research@fdic.gov

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EXHIBIT "B"



Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

Office of Executive Secretary

SCANNED

Mr. Montez Day
#12291-076 "J" Unit
United States Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

FEB 21 2001

FDIC Log# 01-0058

Dear Mr. Day:

This will respond to your letter dated January 16, 2001, pursuant to the provisions of the Freedom of Information Act ("FOIA," 5 U.S.C. § 552), for information with regard to Home Savings of America, 301 South Maclay, San Fernando, California 91340. You specifically ask the following questions: (1) Is this bank a member of the Federal Reserve System? If so, list date when it became a member and send a copy of the certificate. (2) Is this bank chartered in the state of California? (3) Is this bank a member of the Federal Deposit Insurance Corporation? If so, list date and send a copy of the FDIC certificate. (4) Is this bank a national bank branch? Please send status of this bank.

The FOIA does not require an agency to answer questions, but rather to provide copies of releaseable documents in response to requests for the same. In an attempt to assist you, however, in this one instance, we will address the questions you pose as well as the document requests.

FDIC records show that Home Savings of America, FSB, Irwindale, California, with the branch you list located at 301 South Maclay Avenue, San Fernando, California, became insured by the FDIC on January 1, 1934. It is a savings association (and not a national bank) which was insured by the FDIC, but was supervised and regulated by the Office of Thrift Supervision ("OTS.") The OTS should be consulted with regard to your questions on the chartering of this bank, at the following address:

Office of Thrift Supervision
Ms. Mary Ann Reinhart
Senior Program Specialist/FOIA
1700 G Street, N.W.
Washington, D. C. 20552

I note that on October 3, 1998, Home Savings of America, FSB merged, without assistance, into Washington Mutual Bank, FA, Stockton, California, which is presently an open and operating FDIC-insured savings association. Enclosed please find several printouts with regard to these banks.

With regard to whether or not Home Savings of America, FSB was a member of the Federal Reserve System, you should write directly to the Board of Governors of the Federal Reserve System at the following address:

SCANNED

- 2 -

Board of Governors of the Federal Reserve System
Ms. Martha Connor
FOIA Office
20th & C Streets, N.W., Room MP500
Washington, D. C. 20551


Upon admission to the FDIC, as a courtesy only, Home Savings of America, FSB was issued an FDIC certificate of insurance. This certificate is not an official record of the FDIC required to be kept by law or regulation, and copies are not retained. Therefore, there is no certificate of insurance to provide for your request.

Federal deposit insurance covers depositors against losses incurred through the insolvency of an institution. It **does not** cover an institution for losses incurred as a result of theft or robbery. Any such claim, therefore, would not be reimbursed by the FDIC. Such insurance is obtained under a bond or through a private insurance carrier chosen by each bank. You may request that an institution provide you with the name of its bondholder or carrier, but they are not required to do so nor are they required to supply the FDIC with that information. Enclosed please find a copy of "Your Insured Deposit," which will provide you with other helpful information on FDIC insurance.

This concludes the processing of your request. Our FOIA regulations at 309(f)(iii) state that as an individual requester, you are entitled to 2 free hours of search and 100 free pages of duplication in making your request (copy enclosed). In processing your request, we have expended the 2 free hours of professional search time to which you are entitled. Our FOIA regulations further state that multiple requests seeking similar or related records from the same requester or group of requesters will be aggregated for the purpose of [fees]. Therefore, any future requests which you may choose to make on the subject of the insurance status of this institution will be subject to the assessment of fees, and should include your agreement to pay such fees, whether or not any information is found or if found, is released. For your reference, enclosed please find a copy of our fee schedule.

As there is no copy of the FDIC insurance certificate to provide for your request, you may choose to treat our response as a partial denial of your request and appeal to the FDIC's General Counsel within 30 business days following receipt of this letter. Should you decide to appeal, please submit your appeal in writing to the Office of the Executive Secretary. Please refer to the FDIC log number and include any additional information that you would like the General Counsel to consider.

Sincerely,


Fredrick L. Fisch
Senior Attorney

Enclosures

CERTIFICATE OF SERVICE

SCANNED

I, MONTEZ DAY hereby certify that I have served a true and correct copy of the following:

MOTION FOR RECONSIDERATION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 60 (b).

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, *Houston v. Lack*, 101 L.Ed.2d 245 (1988), upon the court and parties to litigation and or his/her attorney(s) of record, by placing same in a sealed, postage prepaid envelope addressed to:

ASSISTANT UNITED STATES ATTORNEY
ANDREW BROWN, ATTORNEY
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

and deposited same in the United States Postal Mail at the United States Penitentiary, Lompoc, California, on this: 06 day of: December, 2001.



Montez Day #12291-076

3901 Klein Boulevard
Lompoc, California 93436